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Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

ATP OIL & GAS CORPORATION

Petitioner,

vs.

DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE, NOW KNOWN AS BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT ("BOEM"); KEN SALAZAR, SECRETARY OF THE DEPARTMENT OF THE INTERIOR; MICHAEL R. BROMWICH, DIRECTOR OF BOEM; LARS T. HERBST, REGIONAL DIRECTOR OF THE GULF OF MEXICO OCS REGION, BOEM

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1:

Whether an agency prevents effective judicial review under the Administrative Procedure Act when its intra-agency appellate board denies the appellant's request to hold an evidentiary fact hearing and then issues a decision, upholding the decision of the subordinate agency, that flatly contradicts, without notice or an opportunity to respond, the position that the subordinate agency took regarding a material fact at the time it engaged in regulatory action with the appellant. A conflict exists on this issue between the Fifth Circuit, which, in the present case, upheld the appellate board's divergence from the prior subordinate agency action without a fact hearing or reasoned explanation, and the D.C., Seventh and Ninth Circuits, which have only upheld such divergence after a full fact hearing and upon reasoned explanation.

QUESTION NO. 2:

Whether the courts below erred in upholding the Defendants' *post hoc* revisions to the BOEM's Lack-of-Rig policy for granting extensions to federal oil and gas leases, which were made in an effort to retroactively justify the BOEM's denial of this policy to Petitioner ATP, where such *post hoc* revisions were predicated on the inherent lack of sufficient clarity in the regulatory vehicle known as the Notice to Lessees, or "NTL", which is used extensively by the BOEM for such federal leases. A conflict exists on this issue between the Fifth and Tenth Circuits,

which allow such *post hoc* revisions to agency policy statements without a formally promulgated and published change, and the District of Columbia ("D.C.") and Seventh Circuits, which require a formally promulgated and published revision.

LIST OF PARTIES

The Plaintiff – Appellant in the proceedings before the United States Court of Appeals for the Fifth Circuit was ATP Oil & Gas Corporation ("ATP"). ATP states that it has no parent company and that, for purposes of this disclosure, ATP is considered to be its own parent company, and no publicly held entity holds ten percent or more of its stock.

Defendants – Appellees were the United States Department of the Interior, Minerals Management Service, now known as Bureau of Ocean Energy Management, Regulation and Enforcement; Ken Salazar, Secretary of the Department of the Interior; Michael R. Bromwich, Director of the Bureau of Ocean Energy Management, Regulation and Enforcement; Lars T. Herbst, Regional Director of the Gulf of Mexico OCS Region, Bureau of Ocean Energy Management, Regulation and Enforcement.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was marked not for publication, and therefore is reprinted in the appendix hereto at pages App. 1a-3a. The opinion of the United States District Court for the Eastern District of Louisiana, also unreported, is reprinted in the appendix hereto at pages App. 37a-55a.

I. BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was issued and filed on September 23, 2010. Petitions for rehearing and rehearing en banc were filed on November 5, 2010 and November 8, 2010 respectively, and denied by the court of appeals on November 30, 2010. The court of appeals order is reprinted in the appendix hereto at pages App. 58a-60a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and 28 U.S.C. §1651.

II. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Administrative Procedure Act, 5 U.S.C. §500 *et seq.* App. 63a-64a, 67a, 68a-70a, 71a-72a.

Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* App. 65a-66a.

Code of Federal Regulations, 30 C.F.R. §250.103. App. 73a-74a.

III. STATEMENT OF THE CASE

A. Overview.

This case presents two important issues of first impression for this Court concerning the standards for final administrative agency review of a subordinate agency decision. Under well-established precedent of this Court, the Defendant Secretary of the Interior violated Petitioner ATP's fundamental rights to judicial review under the Administrative Procedure Act, ("APA"), 5 U.S.C. §500 *et seq.* And, by applying standards in conflict with other Circuit Courts, principally, the D.C., Seventh and Ninth Circuits, the courts below erred in upholding the Defendants' conduct which violated Petitioner ATP's rights under the APA, as articulated by this Court through the *Whole Record Doctrine* under §706 of the APA and under this Court's clear mandates in *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87 (1943) and *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 487-88 (1951).

This case is an action for judicial review of the written denial issued on August 29, 2006 by the Bureau of Ocean Energy Management Regulation and Enforcement, ("BOEM" acting under its prior name, the Minerals Management Service or "MMS"), of a request by Petitioner ATP for a 60 day extension of its oil and gas lease located in the Gulf of Mexico and issued under the Outer Continental Shelf Lands Act, ("O.C.S.L.A."), 43 U.S.C. §1331 *et seq.*, in order to bring the first available drilling rig onto its lease to drill the initial well, (the "BOEM Denial"). App. 82a-84a.

Petitioner ATP, a respected participant in the U.S. offshore oil and gas industry, has expended hundreds of millions of dollars in the domestic economy, rather than in foreign shipyards. ATP drills safe development wells, having, by its own initiative, long ago instituted redundant safety measures that to this day still exceed the current BOEM requirements.

B. Factual Background.

1. The Lack-of-Rig NTL.

When ATP submitted its request for a lease extension on July 25, 2006, called a Suspension of Operations or "SOO" under BOEM regulations, the BOEM had in effect a temporary policy that liberalized the granting of such lease extensions because the entire offshore industry was suffering a worldwide shortage of available drilling rigs, exacerbated in the Gulf of Mexico by the extensive damage caused by Hurricanes Katrina and Rita.

The policy had been issued on February 10, 2006, in the form of an agency policy document, Notice to Lessees NTL No. 2006-G02, referred to here as the "Lack-of-Rig NTL." App. 75a-78a. The Lack-of-Rig NTL consisted of two distinct portions: (1) a section setting forth the temporary policy being implemented, including its three express requirements; and (2) a preamble discussing the pre-existing policy for granting SOO extensions as a comparative backdrop for the purpose and scope of the temporary policy. *Id.*

The pre-existing regime under the previous policy required a lessee to have completed every aspect of preparing to drill before the lease termination date. App. 76a-77a. In sharp contrast, the Lack-of-Rig NTL, in recognition of the lack of presently available rigs, allowed an SOO where the lessee's rig contract did not call for drilling to commence before the lease terminated. App. 77a. In other words, the fundamental purpose of the Lack-of-Rig NTL was to allow an extension where a lessee could only contract for a rig to begin drilling *after* the lease would have otherwise terminated.

2. ATP's request for an SOO after months of preparation for drilling in coordination with the BOEM.

The lease at issue, Lease OCS-G 16662, in Block 943 of the Mississippi Canyon Area of Offshore Louisiana in the Gulf of Mexico, (hereinafter "MC 943"), was originally granted to a domestic subsidiary of an Australian conglomerate effective August 1, 1996 and was in its primary term until July 31, 2006, which was the effective lease termination date in the absence of drilling. App. 8a. MC 943, which is located in deepwater, was never developed by its original owner and has lain fallow since 1996. App. 87a. ATP purchased a majority interest in MC 943 on May 17, 2006 at a substantial cost. App. 86a. On May 23, 2006, the BOEM approved ATP as designated operator. On July 24, 2006, ATP acquired the remaining interest in MC 943. *Id.*

ATP is in the business of promptly bringing offshore leases into production, on a short turn-around, that were originally issued to other lessees who did not produce them. App. 87a. This short turn-around is necessary because the decision by the original lessee to forego drilling normally takes place very late in the lease's life. By successfully bringing such leases to production, ATP serves a particular and strategically valuable niche in the offshore oil and gas industry by producing oil and gas that would have otherwise been stranded. Since its inception in 1991, the company has had an exceptionally strong development success record of 98 percent in taking federal leases to production that were previously undeveloped and non-producing. *Id.*

The record evidence is undisputed that ATP diligently pursued the drilling of the first well on MC 943 prior to the approaching lease termination on July 31, 2006. App. 87a-98a. It did so in continuous, often daily communication with the local BOEM Regional Office. The record is equally undisputed that, until the BOEM Denial, the local BOEM personnel likewise worked in full cooperation with ATP while it pursued its plans to drill. *Id.*

Even prior to closing on its acquisition of MC 943, ATP began negotiations to retain a drilling rig to commence operations prior to the end of the lease's primary term. In April 2006, ATP initiated discussions with Diamond Drilling Company ("Diamond") involving the capability of the semi-submersible *Ocean Quest* to drill a well in the 4,400 foot water depth on MC 943. App. 88a. In response, Diamond forwarded an extensive internal engineering analysis that the *Ocean Quest* could drill

a well in this water depth. *Id.* After additional meetings, on June 1, 2006, ATP and Diamond executed a Domestic Daywork Drilling Contract – Offshore for the use of the drilling rig *Ocean Quest* for 180 days (the "Daywork Drilling Contract"). App. 89a. The Daywork Drilling Contract was in the form of a master work agreement, a form of contract used throughout the oil and gas industry.

In spite of its execution of the Daywork Drilling Contract, Diamond continued to express concerns in light of its devastating experience with Hurricanes Katrina and Rita in the prior hurricane season; and, in mid-June 2006, ATP asked Diamond to consider an alternate plan for the *Ocean Quest* to drill a shallow well to conductor pipe depth, run casing and temporarily abandon the well (hereinafter the "TA Well"). *Id.* Diamond responded affirmatively. *Id.*

In its continuing efforts to keep BOEM apprised, on June 30, 2006, ATP asked the BOEM to confirm that ATP's commitment to drill the TA Well would provide the basis for an SOO if circumstances did not allow the *Ocean Quest* to move to MC 943 before the lease expiration date. App. 89a-90a. After communications to find the appropriate officer, in a written email on July 14, the BOEM Regional Supervisor approved the TA Well as a leaseholding activity: "We consider drilling out of drive pipe (spudding) with a rig that is capable of drilling to TD to be a lease holding activity." App. 90a-91a. The Regional Supervisor reiterated the approval in a later email response that day: "Your planned activity is a lease holding activity since the rig is

capable and you are drilling and setting conductor." App. 91a.

In the face of Diamond's concerns, ATP also pursued an alternate strategy of trying to contract another rig while still diligently coordinating with Diamond. ATP made at least eight such separate, fruitless attempts to contract another rig with other drilling contractors. App. 96a-98a.

Given the BOEM's authorization that drilling the TA Well would be a lease holding event, ATP continued to diligently pursue the plan with Diamond to drill the TA Well, making significant expenditures of both money and personnel time. On July 18, 2006, Diamond confirmed in a written letter to use the *Ocean Quest* under the Daywork Drilling Contract to drill the TA Well at MC 943 once the mooring plan was finalized. App. 93a.

However, because (1) no other rig was available, (2) the contracted starting time for the *Ocean Quest* specified the finalized mooring plan, which would take until after the MC 943 lease terminated, and (3) strong ocean currents arose that prevented safe rig movement and mooring, ATP filed a request for a lease extension or SOO.

ATP's request consisted of two letters, dated July 25 and supplemented on July 27, 2006. App. 94a-98a. Its request expressly complied with the three explicit requirements set forth in the Lack-of-Rig NTL: (1) a survey of offshore rigs to ensure that no alternate rig could be available before the *Ocean Quest*; (2) a verification of the drilling contract for the *Ocean Quest*; and (3) a proposed date to commence drilling within 60 days. *Id.* In particular, the July 27, 2006 letter recounted the efforts of ATP

to secure a drilling rig for MC 943 from other Gulf operators, describing ATP's verbal contacts with BP, Kerr-McGee and Hydro and written requests to five additional drilling companies. App. 96a-98a.

ATP continued to keep in frequent contact with the BOEM regional personnel, and on August 17, 2006, after the primary term of the lease had expired, nine representatives of the BOEM met with ATP to discuss the status of the request for an SOO on MC 943. App. 100a. The BOEM's own records of the meeting show that not only were the BOEM personnel still looking on ATP's request as valid, they tentatively decided to grant an SOO in light of ATP's possibility to secure another rig, which was communicated to ATP informally later that day. App. 100a-101a.

The BOEM records also show that, on the evening of August 17, after the meeting with ATP, one of the BOEM employees who attended the meeting sent an email to the other attending employees in order to lobby against their decision to grant ATP its SOO extension. App. 79a-81a. In this email, the employee does not reference the Lack-of-Rig NTL or its purpose or requirements, but rather bases his lobbying on his personal opinion that ATP's request was merely "ATP being ATP" for such things as filing "at the last minute" and incompetently, if not disingenuously, discussing the prevailing ocean currents. App. 80a.

3. The BOEM Denial.

Notwithstanding the months of coordinated communication and the August 17 meeting and

informal offer, in a complete about-face, on August 29, 2006, the BOEM issued a written Denial of ATP's request. App. 82a-84a. The BOEM Denial does not reference the operative policy in the Lack-of-Rig NTL or its requirements. *Id.* Rather, the BOEM Denial stated it was based on a single ground, that is, that ATP did not have two particular administrative approvals, an EP and APD. App. 83a.

As the agency has ultimately admitted, these approvals were only required for an extension under the pre-existing policy discussed in the NTL's preamble section. Thus, the BOEM Denial merely applied the pre-existing policy to ATP's request and ignored the operative policy in the Lack-of-Rig NTL as thoroughly as if they had torn off the page of the NTL after the preamble.

Further, the email sent by the BOEM employee on the evening of the August 17 meeting with ATP confirms that the BOEM frontline personnel did not discuss or even give recognition to the Lack-of-Rig NTL while considering ATP's request. App. 79a-81a.

Notably, the BOEM written Denial expressly recognized that ATP had the *Ocean Quest* under contract. App. 82a.

4. ATP's appeal to the IBLA.

Because these two administrative approvals upon which the Denial was based were not requirements in the Lack-of-Rig NTL's temporary policy, but indeed would contradict its very purpose, ATP appealed the BOEM's Denial to the Interior

Board of Land Appeals ("IBLA" or "Board") within the Department of the Interior. App. 102a. As an integral part of its appeal, ATP requested a fact-finding hearing before an Administrative Law Judge ("ALJ") to adjudicate whether any factual support existed for the BOEM Denial, including evidence of the actual conduct by the BOEM's personnel at the time of the agency decision to deny ATP's request.

Notably, the BOEM Answer to ATP's Supplemental Statement of Reasons affirmatively justified its Denial in part on the assertion that ATP had a drilling contract.

On January 4, 2008, the Board issued a Decision (the "Decision" or "Board Decision") refusing the request for an ALJ hearing and upholding the Denial on the ground set out in the BOEM's Denial. App. 37a-55a.

C. Previous proceedings on judicial review.

ATP sought judicial review in the United States District Court for the Eastern District of Louisiana on the grounds that (1) the IBLA abused its discretion in refusing to hold a fact hearing before an ALJ despite ATP's identification of several material fact issues, necessary to support the BOEM's decision and not adequately addressed in the existing record; and (2) the BOEM's Denial and the Board's rote upholding of it were arbitrary and capricious and contrary to law because their only stated basis, that ATP failed to obtain two specific administrative approvals, would be fatally contrary to the Lack-of-Rig NTL and was not a requirement of the NTL or any other authority cited by the agency.

The basis for federal jurisdiction before the District Court as the court of first instance was pursuant to 28 U.S.C. §1331, the O.C.S.L.A. and the APA.

On initial judicial review and then on appeal, the Defendants offered ever changing, often contradictory interpretations of both the agency's own policy and of ATP's application thereunder. Before the District Court, the Defendants argued that NTL 2006-G02 did not establish a new procedure for obtaining an SOO, instead positing that the Lack-of-Rig NTL must be "read in its entirety", (despite the admitted failure in the Board Decision to even mention the operative text of the Lack-of-Rig NTL) and that such an "entirety" interpretation justified the BOEM's application of the pre-existing requirements for the administrative approvals even under the new Lack-of-Rig NTL.

The District Court did not rule on this substantive ground. Rather, it upheld the BOEM and the Board on an entirely new theory, neither raised nor relied on by either of them as the basis for their respective decisions, namely, that ATP did not have a drilling contract at all:

> "[t]herefore, notwithstanding that ATP did not have an approved EP and APD, there is no genuine issue of material fact that *ATP did not meet the requirement that a contract to begin drilling operations had been executed*" App. 53a (emphasis added).

This issue had been raised by the Defendants' appellate counsel for the first time in their Cross-Motion for Summary Judgment.

On appeal to the Fifth Circuit, the Defendants proffered another entirely new, contradictory explanation of NTL 2006-G02, after acknowledging that the Lack-of-Rig policy *did* present a new, separate basis for obtaining a lease extension that did not require an EP or APD. The Agency's *new* theory, presented by appellate counsel, was that the Lack-of-Rig NTL was a two-prong policy and that the applicant was required to elect which prong of the NTL they were applying under. It was an appellate argument that openly contradicted the Agency's argument before the District Court that the policy must be read in its entirety. More concerning, it literally re-wrote the NTL to fabricate the dual prong structure and created an application process out of whole cloth that never appeared in the Lack-of-Rig NTL itself.

The Fifth Circuit upheld the District Court in an opinion that reiterated, without discussion, the District Court's ruling on the lack-of-contract issue and also reiterated the BOEM's ground that ATP lacked the two administrative approvals. App. 1a-3a.

IV. REASONS FOR GRANTING THE WRIT

This Petition arises at the critical intersection between due process and administrative law. It affords this Court the opportunity to address two issues, upon which the Courts of Appeal have diverged, that are central to fair and just

adjudications in the administrative process: first, whether an agency internal adjudicative body may at once deny an opportunity for an evidentiary hearing while reaching outside the administrative record to affirm an agency decision; and, second, when and how an agency may reinterpret and reinvent its policies. In each instance, the Court of Appeals for the Fifth Circuit has afforded the Department of Interior broad latitude to tailor the facts and recast its own policy, respectively, in ways that are fundamentally inconsistent with prior decisions of this Court, other Courts of Appeals and basic notions of due process and fair play. Because the stakes are enormous, not simply for ATP but also for the integrity of the administrative process, these questions merit this Court's scrutiny.

First, this matter presents a case study of an agency, the Department of the Interior, that refused to engage in meaningful compliance with its obligations under the APA to fairly and independently scrutinize what, by any measure, was a simple, but plain error by frontline administrative personnel by ignoring the existence of their newly issued policy. Instead, the Defendants engaged in concerted action that effectively denied ATP's rights to have this error reviewed and corrected under the APA. This case presents a matter of growing significance because governmental responsibilities of all three branches, executive, legislative and judicial, are increasingly devolving to the federal administrative agencies and this trend will only accelerate in areas of health and energy regulation.

Specifically, when ATP appealed the written Denial by the frontline BOEM personnel on grounds

that it fundamentally contradicted the express terms and stated purpose of the Lack-of-Rig NTL, the Department, through its Board, refused to hold a fact hearing and then upheld the BOEM Denial on the same erroneous grounds stated in the Denial, but also included in its Decision a purported finding on an issue that had never been previously raised. App. 33a-34a. The Board's refusal to hold a hearing prevented ATP from adjudicating the substantive errors of the stated reason for BOEM Denial.

Equally harmful, the Board's refusal to hold a hearing effectively hid from ATP the factual basis upon which the District Court subsequently ruled, (that ATP lacked a drilling contract), until it emerged as an incidental statement in the Board's Decision *after* the time ATP could address it in the administrative record. *Id.* This incidental statement contradicted the only previous statements and conduct by the BOEM and its frontline personnel that ATP *had* a drilling contract. The Board's statement, in what would be considered *dicta* were it a court, was even contrary to BOEM's admission in its Answer that ATP had a drilling contract. The Board's refusal to hold a fact hearing guaranteed there would be no opportunity for ATP to discover the existence of the issue and to challenge it on a complete administrative record with findings by an ALJ.

This Court must review the standards, or lack thereof, upon which both of the courts below uncritically relied in validating the Board's *post hoc* contradiction of the BOEM's prior conduct as the final agency action subject to review. In doing so, both courts allowed the Defendant Board to diverge

from the prior conduct and stated position of its subordinate agency without a reasoned justification or substantial evidence in the record. Thus, the courts below applied standards that were not only in conflict with the express standards recognized in the D.C., Ninth and Seventh Circuits, which require clear articulation of any such divergence, but also with the clear prior pronouncements of this Court.

The action by the Board, ratified by both courts below, effectively prevented the development of a complete record in evasion of the *Whole Record Doctrine* in §706 of the APA as required under *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). App. 63a-64a. The courts below relied on a stray statement by the Board that was not supported by substantial evidence in the context of the entire record and thus violated the fundamental holding of *Universal Camera*, 340 U.S. at 487-88. Just as importantly, this reliance evaded the fundamental policy of this Court's *Chenery Doctrine* (*S.E.C. v. Chenery Corp.*, 318 U.S. 80 (1943)) because the courts below upheld the Defendants on a basis not put forth by the Defendants themselves at the only time that could be relevant to the process of judicial review on the administrative record.

Second, the Secretary is required by O.C.S.L.A. (43 U.S.C. §1334 (a)(1)) to provide, by regulation, for the issuance of extensions for oil and gas leases, and has done so under existing BOEM regulations and policy statements. App. 65a-66a. The issuance of oil and gas leases on federal lands, where the federal government receives substantial sums, often in hundreds of millions of dollars in

bonuses and royalty payments, is a proprietary rather than purely governmental function. The BOEM's Lack-of-Rig policy was an appropriate solution to liberalize the pre-existing policy in response to the unprecedented rig shortage that existed throughout the industry especially after Hurricanes Katrina and Rita.

However, the BOEM implemented this Lack-of-Rig policy through the inherently vague, imprecise and indeterminate narrative-form NTL that lacked the requisite clarity to prevent arbitrary application by the BOEM personnel when they chose to do so in response to ATP's request. In conflict with standards recognized in the D.C., Seventh and Ninth Circuits, the courts below erroneously upheld the Defendants' arbitrary and capricious *post hoc* interpretations of its Lack-of-Rig NTL. In the D.C., Seventh and Ninth Circuits, such *post hoc* revisions to an established interpretative policy can only be made upon a formal and published change or repudiation to the policy by the agency. Here, in contrast, the Fifth Circuit allowed the Defendants to revise the Lack-of-Rig NTL in multiple ways after its implementation, many of which occurred on this current appeal, on an *ad hoc* basis without prior notice or publication.

This Court has never before reviewed the substantive use of this regulatory vehicle known as the Notice to Lessees. It is used extensively by the BOEM in regulating federal OCS oil and gas leases, yet there is dearth of any judicial scrutiny. The BOEM requires strict compliance by operators and lessees with its NTLs, and yet, in the present case, it arbitrarily deviated from its own NTL-established

policy and sought to cover its deviation under the cloak of the indeterminate structure and imprecise language of the Lack-of-Rig NTL. The BOEM may not and should not be allowed to exploit its own vagueness and lack of clarity in the form of NTLs and still be in compliance with the APA. It is a matter of significant national interest for this Court to scrutinize BOEM's own compliance with its NTL-implemented policies, especially at this time of regulatory turmoil and change in the Gulf of Mexico.

For these reasons, Petitioner ATP respectfully requests that this Court accept its petition for writ of certiorari.

V. ARGUMENT

A. Question Presented No. 1.

Notice of the issues and facts that an agency will consider in exercising its adjudicatory function is a fundamental right of the regulated party. A party is entitled to know the issues on which decisions will turn and to be apprised of the factual basis on which the agency relies for a decision so that he may have a fair opportunity to rebut it. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 288, n. 4 (1974).

Just as fundamentally, an agency action can only be upheld on the basis set forth by the agency itself. *S.E.C. v. Chenery Corporation*, 332 U.S. 194, 197 (1947); *Motor Vehicle Mfgs. Assoc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). And, an agency's statement must be supported by substantial evidence on the whole record. *Universal Camera*

Corp., 340 U.S. at 488. Any change from prior rules, decisions, statements or policies must be supported by reasonable explanation. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. Of Trade*, 412 U.S. 800, 808 (1973).

ATP was denied prior knowledge of the basis upon which the agency would ultimately be upheld by both courts below and, accordingly, denied a meaningful opportunity to test the underlying factual premise, namely, ATP's purported lack of a drilling contract. It was also denied the right to adjudicate the substantive errors underlying the Defendants' denial of ATP's request and to show that the BOEM Denial was itself a pretext with no connection to the actual decision making of the BOEM personnel.

The record is undisputed that the conduct and statements of the Defendants prior to the issuance of the Board's Decision were all consistent that ATP *had* a drilling contract, and shows that the isolated statement in the Board's Decision that ATP had no contract fundamentally contradicted, without prior notice to ATP, the prior actions, statements, writings, and pleadings of the BOEM.

The Board's Decision is consistent with the BOEM's express position that it took before the Board to support its Denial: the Decision and underlying analysis focused exclusively on the justifying the alleged requirement for the two administrative approvals cited as the basis for the BOEM Denial. App. 25a-33a.

However, like the proverbial dog in the manger, buried in the Board's discussion criticizing ATP's failure to obtain permits based on the pre-

existing SOO requirements that required drilling before lease termination, the Decision included the unsupported statement that ATP did not have a drilling contract at all. App. 34a. This isolated statement was not connected to any evidence, was incidental to the Board's Decision, which turned on the alleged requirement for permits, and was thus, mere *dictum*. It flatly contradicted the BOEM's previous conduct and statements on the point. Worse, having denied ATP a fact hearing before an ALJ, the Defendants could not, within the confines of fair notice and due process, make a finding on such an issue of mixed law and fact. *See, e.g., Ham Marine, Inc. v. Dresser Indus., Inc.*, 72 F.3d 454, 458-459 (5th Cir. 1995) ("Whether a contract exists involves both questions of fact and questions of law.")

Yet, upon judicial review, this stray statement, made without prior notice and in complete contradiction to the previous position of the subordinate agency, became the sole basis upon which the District Court upheld the Board Decision. App. 52a-53a. This conclusion was repeated by the Court of Appeals with no discussion of the basis. App. 3a. This Court has not previously been presented with the present circumstance where an agency's internal appellate board, after denying an appellant a fact hearing, introduces a new conclusion – in this case, a legal conclusion that must be based on necessary factual predicates of contract formation – that contradicts the previous conduct of its subordinate agency at the time it was engaged with the appellant during the administrative process and

does so with neither reasoned explanation of the divergence nor substantial evidence.

The Fifth Circuit affirmed the District Court and the IBLA, each of which had ruled on different grounds from one another. The Panel upheld the District Court's holding regarding the alleged lack of a contract. It affirmed the BOEM and IBLA on their position that the denial of the SOO was justified because ATP lacked an EP and APD, (notwithstanding Defendants' admission before the Fifth Circuit that these permits were not required under the Lack-of-Rig NTL). In doing so, the Fifth Circuit Panel applied standards for the reviewing court's use of the record beyond the use made by the agency itself that are in conflict with those in the Courts in the D.C, Seventh and Ninth Circuits in two distinct ways. In both, the result eschewed the very purpose of critical scrutiny through effective judicial review.

First, the Ninth, Seventh and D.C. Circuits apply standards that strictly require that any change or contradiction by an agency's appellate body of the action of a subordinate agency must be adequately explained on the full record. Notably, every reported case from these circuits involves cases where a full hearing was held before an ALJ with a full record of issues and findings. *See, e.g., Hjelvik v. Babbitt*, 198 F.3d 1072, 1076 (9th Cir. 1999)(where the Ninth Circuit upheld an IBLA decision that contradicted the findings of subordinate agency personnel, but where the proceedings included an ALJ hearing and where the court found that the IBLA's decision was supported by substantial evidence). *See also N.L.R.B. v.*

Indianapolis Mack Sales & Serv., Inc., 802 F.2d 280, 285 (7th Cir. 1986) and *Alaska Professional Hunters Assn. v. F.A.A.* 177 F.3d 1030, 1035 (D.C. Cir. 1999).

Here, in contrast, the Fifth Circuit did not require any reasoned justification from the Defendants for the Board's *post hoc* divergence from the prior conduct and stated reasons of the subordinate agency, the BOEM.

Second, these Circuits also apply strict standards to ensure that judicial review is limited to the administrative record, and not *de novo*, and that a court is not permitted to look beyond the administrative record, i.e., the evidence and statements presented by the agency itself, in order to reach an independent justification of an agency action. In this, these Circuits require that an agency be upheld only on reasons given by the agency itself based on substantial evidence. *See, e.g., Indianapolis Mack*, 802 F.2d at 285 (holding that the decision of an administrative agency, "unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning."). This position is consistent with what this Court has held. *See, e.g., N.L.R.B. v. Metropolitan Ins. Co.*, 380 U.S. 438, 444 (1965)("For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress

has set aside exclusively for the administrative agency.' ") (quoting *Chenery*, 332 U.S. at 196.

The Seventh Circuit clearly recognizes that the decision of an administrative agency, "unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning." *Indianapolis Mack*, 802 F.2d at 285; *see also, Beloit Corp., Castings Div. v. N.L.R.B.*, 857 F.2d 1154, 1156 (7th Cir. 1988).

Seventh Circuit panels have expressly warned that courts, in deferring to an agency's expertise, should not abrogate their responsibilities for oversight of agencies: "[a]lthough this standard of review accords the Board considerable discretion, it does not mean that we will simply rubber-stamp its decisions, thereby substituting judicial abdication for judicial review." *Indianapolis Mack*, 802 F.2d at 283.

In the present case, in contrast, the Fifth Circuit, as well as the District Court, upheld the agency on a single statement that was not only in the nature of *dicta*, but was neither supported by a reason given by the agency itself nor by substantial evidence. In fact, the District Court presented an independent justification different from that presented by the agency itself. Because this practice on judicial review is in conflict with that allowed in the D.C., Seventh and Ninth Circuits, this Court must resolve this conflict.

The refusal of the Fifth Circuit Panel to review the Defendants' actions under the same standards of the D.C., Seventh and Ninth Circuits has worked three distinct harms on ATP.

First, a federal offshore oil lease is a private right, the deprivation of which requires basic due process including notice of the issues on which an agency's decision will turn and the opportunity to respond on the record to those issues. *See, e.g., Bowman Transportation,* 419 U.S. at 288. A lease suspension or SOO is a right and an inherent component of an offshore lease, prescribed by the O.C.S.L.A., 43 U.S.C. §1334 (a)(1), and not a discretionary, gratuitous act on the part of BOEM. App. 65a-66a. "When the United States enters into contract relations, it is expected to abide by the terms of that contract, and "its rights and duties therein are governed generally by the law applicable to contracts between private individuals," *United States* v. *Winstar Corp.,* 518 U.S. 839, 895 (1996) (quoting *Lynch v. United States,* 292 U.S. 571, 579 (1934).

To the degree the Board has discretion to deny a factual hearing, it is not unlimited. The Board may not deny a hearing when the disputed issues may not be resolved through an examination of written submissions, (*see, e.g., Orion Reserves Limited Partnership v. Salazar,* 553 F.3d 697, 707-08 (D.C. Cir. 2009); *Codd v. Velger*, 429 U.S. 624, 627-28 (1977) or when there are significant factual or legal issues remaining to be decided and the record without a hearing would be insufficient for resolving them, (*Woods Petroleum Co.*, 86 I.B.L.A. 46, 55 (1985)). An agency can satisfy due process standards without a hearing where it can fairly find facts on the existing record without a hearing. However, the APA applies the special rigor of a hearing to agency decisions of the type made by

BOEM in considering ATP's SOO request, as reflected in APA §558. ("[D]ue regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time,"; before a license is withdrawn, revoked, or annulled, the agency "shall set and complete proceedings, proceeded by (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.) 5 U.S.C. §§551(8) and 558. App. 67a, 71a-72a.

In the present case, the Board simply denied ATP's request for a hearing that was necessary to uncover and adjudicate the very issue on which both courts below ruled. Congress has not given the discretion to any agency to make pronouncements outside of and unfettered by the record after denying appellants the opportunity to develop a record. Such discretion would undermine the broad deference given or which should be given to agencies to lawfully exercise their expertise. *See United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (J. Scalia, dissenting).

Second, the Board's statement about ATP's drilling contract in the Board's Decision also violated the APA's *Whole Record Doctrine*. The APA requires a review of "the whole record" to determine whether the challenged decision should be set aside as "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706. The *Whole Record Doctrine* was enshrined by this Court in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), which held that the administrative record must be adequate to enable a

reviewing court to fulfill its APA §706 duties. 401 U.S. at 419; App. 63a-64a. The Board's statement was not connected to or supported by even the portion of the Decision it appeared in; thus, any use of such a statement is in outright violation of this court's pronouncement in *Universal Camera* which, since 1951, has prohibited use of isolated statements taken out of context of the entire record, but rather requires that substantial evidence be determined only in the context of the entire record. *Universal Camera,* 340 U.S. at 488 ("[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight").

Third, the Board's reversal of the BOEM's position regarding what became a material issue only upon judicial review, after the record closed and with no opportunity for ATP to respond, violates the fundamental policy underlying the doctrine established by this Court in *Chenery Corp.*, 318 U.S. at 94-95, holding that discretionary administrative action will only be upheld on grounds articulated by the agency in the record. While preserving agencies' authority to exercise the discretion delegated by Congress and preventing courts from substituting their own policy for that of the agency, the *Chenery Doctrine* limits agency power to make policy outside of public scrutiny. *Chenery* is fundamentally violated where the agency inserts new factual conclusions in its Decision after the record underlying the Decision closes.

B. Question Presented No. 2.

The courts below erred in upholding the Defendants' *post hoc* revisions to the BOEM's Lack-of-Rig policy that nullified its purpose. These *post hoc* revisions were made possible by the inherent lack of sufficient clarity in the regulatory vehicle known as the Notice to Lessees, or "NTL". As this Court has made clear in other contexts, fair notice is a fundamental component of due process. Permitting the government to reinvent the rules in mid-stream would be unthinkable in a civil or criminal action based upon a statute; it is no less so in the administrative process. As we set forth below, the Court of Appeals in this case has afforded the BOEM vast latitude that is inconsistent with due process, prior decisions of this Court, and the approach taken by other Circuits. Because the BOEM uses NTLs extensively in administering and regulating federal O.C.S.L.A. leases and the offshore industry of lessees, operators and service companies holding and operating these leases, it is a matter of significant importance.

The BOEM publishes a number of NTLs annually to provide substantive guidance and explanations of agency regulations and policies to operators and lessees pursuant to the express provisions of 30 C.F.R. §250.103. App. 73a-74a. As a point of reference, the BOEM has published a series of NTLs in the immediate aftermath of the *Deepwater Horizon* incident to impose new safety and reporting requirements on Gulf operators and lessees, including NTL Nos. 2010 N05 through N10. While NTLs may be an effective tool for BOEM's

administration of this crucial industry when drafted and implemented properly and applied consistently, the present case highlights the inherent shortcomings of the NTL format. This format allows, in fact is premised on, an unstructured lengthy narrative that has no safeguards to ensure enforceable clarity. Therefore, it is susceptible to and invites *post hoc* variances, inconsistencies and revisionist interpretations in actual application.

The Lack-of-Rig NTL was BOEM's attempt to use this quasi-regulatory vehicle to responsibly address the unquestionable emergency caused by the shortage of drilling rigs in the Gulf of Mexico due to Hurricanes Katrina and Rita. When it is read fairly and plainly, the Lack-of-Rig NTL implemented a temporary policy that was a reasonable and highly appropriate response to this emergency. This appeal is not a challenge to the validity of the Lack-of-Rig NTL policy.

Rather, we question the Defendants' misuse of the inherent shortcomings of the Lack-of-Rig NTL after it was implemented to arbitrarily and capriciously deny its policy to Petitioner ATP and then to avoid effective judicial review under the APA.

The Lack-of-Rig NTL, as is typical for these documents, was issued in a multi-page narrative format. The short operative section with the requirements granting an SOO under the new Lack-of-Rig policy appeared on and only comprised a portion of the second page. App. 77a. A lengthy preamble was included that discussed, for comparison, the pre-existing policy for granting those lease extensions. App. 75a-77a.

Because NTLs are issued unilaterally by BOEM, without input from and dialogue with industry stakeholders, this narrative format inherently lacks the distilling and corrective benefits of notice and comment rulemaking. This Court has previously recognized that the notice and comment process was "designed to assure fairness and mature consideration of rules of general application." *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The process allows the agency to "educate itself before adopting a final order." *Pennzoil Co. v. Fed. Energy Regulatory Comm'n*, 645 F.2d 360, 371 (5th Cir. 1981). In addition, public notice requires the agency to disclose its thinking on matters that will affect regulated parties. *See, e.g., United States v. Dean*, 604 F.3d 1275, 1278 (11th Cir. 2010).

Defendant Interior has long recognized the importance of and committed itself to public participation in rulemaking. *See* Secretarial Statement, dated April 12, 1958, adopting a policy of complying with notice-and-comment procedures when feasible, notwithstanding APA's "public property" exception (5 U.S.C. §553(a)(2)), subsequently reaffirmed in a 1971 "Notice" published in the Federal Register declaring the Department's policy ". . . to give notice of proposed rulemaking and to invite the public to participate in rulemaking in instances where not required by law . . . to the fullest extent possible." App. 68a-70a.

In contrast, the NTL, unilaterally issued by the BOEM, lacks the benefits of public input and comment, including the requisite clarity and accountability that could prevent subsequent arbitrary and capricious re-interpretation and

inconsistent application of NTL-implemented policies. The BOEM requires strict conformance with its NTLs; yet, in the current case, when the agency's frontline personnel and the Board simply ignored their own Lack-of-Rig policy in regard to ATP, the Defendants hid the failure from review by fabricating and offering radically different re-interpretations of the Lack-of-Rig NTL throughout judicial review. The record here is simple and clear. The Defendants have, uniformly and without exception, ignored the operative portion of the Lack-of-Rig NTL. Rather, they have based every one of their ever changing positions on the non-operative preamble of the Lack-of-Rig NTL, from the original BOEM Denial to the final iteration of their appellate arguments.

This Court has never examined the BOEM's extensive use of NTLs to regulate the critical offshore oil industry and, therefore, has never examined the inherent shortcomings of NTLs that allow the agency to avoid lawful accountability for their actions. Also, there is a lack of clarity among, and a critical need to resolve a conflict between, Circuits as to the standards to which an agency should be held in promulgating changes to existing policy statements, such as NTLs, and in applying them consistently and fairly.

In this case, as opposed to fair and consistent application to ATP's request, the BOEM ignored the operative portion of the NTL, which it had no discretion to do. The IBLA Decision compounded the error by entirely failing to engage in a substantial inquiry of the BOEM Denial by considering an important aspect of the problem. 5 U.S.C. §706(2)(A),

App. 63a-64a; *Motor Vehicle*, 463 U.S. at 43-44. The record is also undisputed that the Defendants used the NTL's inherent lack of clarity to offer new, even contradictory interpretations of the Defendants' policy to both the District Court and the Fifth Circuit.

Having published the Lack-of-Rig NTL to implement a reasonable and appropriate response to a catastrophic situation, BOEM, including its front-line personnel, was bound by the terms of the NTL, including its stated procedures and exceptions, unless and until declared invalid or changed by the BOEM itself upon reasoned analysis and justification. *Atchison*, 412 U.S. at 808. The only alternative is that the Lack-of-Rig NTL (and all other NTLs) are meaningless non-binding policies.

The BOEM and the Board's disregard of and inconsistent application of the Lack-of-Rig NTL illustrate the lack of consistent statutory or judicial accountability to which the BOEM is held in its use of NTLs. To the limited extent courts below have examined the issue, they have varied in the standards of accountability to which they have held agencies' changes to interpretive policy guidance documents. As described below, the standards followed by the Fifth Circuit in this present case are in sharp contrast with the highly specific standards articulated in the D.C. and Seventh Circuits. The D.C. Circuit standards, in turn, have been rejected by the Tenth Circuit.

The Fifth Circuit has recognized that "the failure of an agency to follow its regulations renders its decision invalid." *See, e.g., Gulf States Mfgs. Inc. v. N.L.R.B.*, 579 F.2d 1298, 1308 (5th Cir. 1978); *see*

also Envtl. Def. Fund v. Marsh, 651 F.2d 983, 1002 (5th Cir. 1981) (citations omitted) (Army Corps of Engineers is bound by the precepts incorporated in its own regulations); and *Chevron Oil Co. v. Andrus*, 588 F.2d 1383, 1386 (5th Cir. 1979), (citing *Service v. Dulles*, 354 U.S. 363, 372 (1957) (finding it an unremarkable proposition that an agency must abide by its own regulations)).

However, beyond these general principles of adherence to published regulations, the Fifth Circuit, in sharp contrast to the D.C. Circuit, has not established clear judicial guidance for what steps an agency must take if it is to deviate from published and implemented policy guidance.

The D.C. Circuit has held that, absent a formally promulgated and published change, an agency is bound to consistent interpretation of its own duly promulgated regulations, policies and procedures. *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997)(holding that once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking). *See also Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir.1997)(Where an agency promulgates rules via notice and comment rulemaking, it is free to modify its application of the rule, or to decline to apply the rule, *only after* exercising additional notice and comment rulemaking. A modification of an interpretive rule construing an agency's substantive regulation will "likely require notice and comment procedure.").

This D.C. Circuit standard was reinforced two years later in *Alaska Professional Hunters*, 177 F.3d at 1035-36, which held that an agency must give opportunity for notice and comment when it significantly revises a previous and definite interpretation.

The Seventh Circuit would also have rejected the Defendants' revisions to the Lack-of-Rig NTL, made or attempted for the first time on judicial review, under its standards of review. *Indianapolis Mack*, 802 F.2d at 285. ("We first note that these arguments made after the initial decision and in support of the application for enforcement are inherently suspect and do not merit our consideration . . . . An administrative agency's decisions, unlike those of a district court, cannot be sustained on a ground appearing in the record to which the agency made no reference; to the contrary, the Board's decision stands or falls on its express findings and reasoning.").

A split on this issue with the Tenth Circuit is noted in *United States v. Magnesium Corp. of America*, 616 F.3d 1129 (10th Cir. 2010), where *Magnesium Corp.* does not follow the holding in *Alaska Hunters.* While *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001) purportedly followed the *Alaska Hunters* reasoning, the failure by the Fifth Circuit Panel in the present case makes it clear that this position is not established law in the Fifth Circuit.

The lack of clear standards for accountability in the BOEM's application and interpretation of NTLs, as evidenced by the opinion of the Fifth Circuit in the present case, is increasingly

problematic as the BOEM relies extensively on NTLs for administering the O.C.S. leases. As a general rule, agencies are free to use NTL-type guidance documents to issue interpretive rules, but not substantive rules. *See, e.g., Mead Corp.*, 533 U.S. at 233-34. A rule or policy declaration that is substantive in nature generally requires notice and comment. *Shell Offshore*, 238 F.3d at 629. The BOEM, by its own regulation, may only issue NTLs for two limited purposes: to clarify, supplement, or provide more detail about certain requirements; or to outline what an operator or lessee must provide as required information in various submissions to BOEM. 30 C.F.R. §250.103, App. 73a-74a. Yet, the BOEM, in its extensive use of NTLs often explores the limits of what may be considered "interpretive" guidance, and the agency has been criticized on at least one occasion for improperly crossing this line in issuing NTLs. *Ensco Offshore Co. v. Salazar*, No. 10-1941, 2010 WL 4116892, *5 (E.D.La. Oct. 19, 2010) (finding that NTL-05 was a substantive rule that required notice and comment).

While ATP did not below, and does not now, dispute that NTL 2006-G02 was a duly promulgated and enforceable agency policy, the BOEM cannot have it both ways: it cannot issue guidance via use of NTLs and demand strict compliance from the operators and lessees it regulates, but then refuse to consistently abide by the plain-language terms of such NTL guidance.

The administrative record, the IBLA Decision, and the orders of the courts below in this case present a case study of how BOEM, through the vagueness and indeterminacy of the NTL, was

unimpeded in its refusal to follow the policy in its own NTL, and how the lack of consistent judicial standards for the use of such documents, allowed the BOEM to shield itself from accountability under APA standards of review. This Court should resolve the conflict among lower courts as to what procedural requirements apply to an agency that changes an interpretation of an existing NTL-type rule or that declines to apply such a rule consistently.

VI. CONCLUSION

Petitioner ATP respectfully requests that this Petition for a Writ of Certiorari be granted and that this Court review the questions presented above.

Respectfully submitted on this 28th day of February, 2011.

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 09-30953

ATP OIL & GAS CORPORATION, INC.,

Plaintiff - Appellant

v.

MINERALS MANAGEMENT SERVICE; KEN SALAZAR, Secretary, Department of the Interior; MICHAEL R. BROMWICH, Director of the Minerals Management Service; LARS T. HERBST, Regional Director of the Gulf of Mexico OCS Region Minerals as of October 1, 2007; UNITED STATES DEPARTMENT OF INTERIOR,

Defendants - Appellees

Appeal from the United States District Court for the
Eastern District of Louisiana,
USDC No. 2:08-CV-1514

Before GARZA and BENAVIDES, Circuit Judges, and LYNN*, District Judge.

PER CURIAM:**

This is an appeal from the district court's order granting Defendant-Appellees' summary judgment motion. Plaintiff-Appellant ATP Oil & Gas Corporation, Inc. ("ATP") challenges the decision of the Interior Board of Land Appeals ("Board"), which had affirmed the Minerals Management Service's ("MMS")[1] denial of ATP's request for a Suspension of Operations. For the reasons stated below, we AFFIRM.

We review a district court's order granting summary judgment de novo, applying the same standard to the agency decision as the district court. See *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008). We must uphold an agency decision unless it is "arbitrary, capricious, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Enron Oil & Gas Co. v. Lujan*, 978 F.2d 212, 215 (5th Cir. 1992).

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* District Judge for the Northern District of Texas, sitting by designation.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] The Department of the Interior has changed the name of MMS to the Bureau of Ocean Energy, Management, Regulation and Enforcement. At oral argument the parties requested, and the panel agreed, to refer to the agency by its former name.

We have reviewed the briefs and record in this case, and heard oral argument. We hold that the Board's decision affirming the denial of the Suspension of Operations was not arbitrary, capricious, or otherwise at odds with the law. The MMS followed its regulations in denying ATP's request for a Suspension of Operations because ATP did not have an executed drilling-rig contract, an approved Exploration Plan, or an Application for Permit to Drill.

AFFIRMED.

United States Department of the Interior

Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
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703 235 3750 703 235 8349 (fax)

ATP OIL & GAS CORPORATION

IBLA 2007-26 Decided January 4, 2008

Appeal from a decision of the Minerals Management Service denying a request for suspension of operations for Federal offshore oil and gas lease. OMMG-2006-003.

Request for hearing denied; decision affirmed.

1. Oil and Gas Leases: Outer Continental Shelf Oil and Gas Leases: Suspensions

Pursuant to the Outer Continental Shelf Lands Act, a lease will expire at the end of its primary term if oil or gas is not being produced in paying quantities. In order to conduct lease exploration and development activities, the lessee must submit and obtain approval of an exploration and/or development plan and application for permit to drill. The Minerals Management Service does not abuse its

discretion in denying a request for a suspension of operations pursuant to 30 C.F.R. § 250.175(a), where the lessee submitted a revised exploration plan 11 days and an application for permit to drill 6 days before the end of the primary lease term, and the record shows that at the time these documents were submitted the lessee had no expectation that it could conduct lease activities before the lease expiration date.

Kerr-McGee Oil & Gas Corp., 172 IBLA 195 (2007), *clarified*.

APPEARANCES: Robert P. Thibault, Esq., Denver, Colorado, for appellant; Richard H. McNeer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

ATP Oil & Gas Corporation (ATP) appeals from an August 29, 2006, decision of the Regional Supervisor for Production and Development, Minerals Management Service (MMS), denying ATP's Request for Suspension of Operations (SOO) of lease OCS-G 16662. As a result of this decision, the lease expired. We affirm.

Statement of Law

The Outer Continental Shelf (OCS) encompasses submerged lands seaward of State-owned submerged lands, which extend approximately three miles from the coastline. 43 U.S.C. §§ 1301(a)(2), 1331(a) (2000); *Samedan Oil Corporation*, 173 IBLA 23, 31 (2007). The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1337(b)(4) (2000), authorizes the Secretary of the Interior, through MMS, to sell leases on the OCS permitting lessees to "explore, develop, and produce" oil and gas within the lease area. 43 U.S.C. § 1337(a) (2000).

OCS leases run for an initial term of 5 years, or "not to exceed 10 years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions." 43 U.S.C. § 1337(b)(2) (2000); 30 C.F.R. § 256.37. The lease shall continue "as long after such initial period as oil or gas is produced from the [lease] in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon." 43 U.S.C. § 1337(b)(2) (2000); 30 C.F.R. § 250.180(a)(2).[1] Exploration or

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[1] All citations are to the 2006 Code of Federal ll citations are to the 2006 *Code of Federal Regulations*. Some changes were made to these rules in 2007, but they do not apply here.

development activity on an OCS lease must be approved by MMS upon the lessee's submitting of appropriate exploration and development plans. *E.g.*, 43 U.S.C. § 1340(c)(1) (2000) (exploration); 43 U.S.C. § 1351(a) (2000) (development and production); 30 C.F.R. § 250.201 ("What plans and information must I submit before I conduct any activities on my lease . . .?").

A lessee must submit an exploration plan (EP) for approval by MMS before conducting activities including exploration drilling, well test flaring, installing well protection structures, or temporary well abandonment. 30 C.F.R. § 250.211. Detailed information must be submitted as a part of or accompany an EP, including, *inter alia*, geological and geophysical information, air emissions data, and environmental monitoring information. 30 C.F.R. § 250.212 through § 250.228. The rules also require "a brief discussion of any suspensions of operations that you anticipate may be necessary in the course of conducting your activities under the EP." 30 C.F.R. § 250.213(f).

The regulations establish a time frame for approval of an EP. First, MMS will determine within 15 working days whether an EP is "submitted," effectively meaning that it is complete. 30 C.F.R. § 250.231(a). Then, MMS will approve, require modification of, or disapprove the EP within 30 calendar days "after the Regional Supervisor deems your EP submitted under § 250.231, or receives the last amendment to your proposed EP, whichever

occurs later." 30 C.F.R. § 250.233(a); *see also* 30 C.F.R. § 250.234(c).

A lessee must obtain MMS' approval of an EP, a Development and Production Plan (DPP), or a Development Operations Coordination Document (DOCD), before applying for permission to drill a well (or before sidetracking, bypassing or deepening a well). 30 C.F.R. § 250.410. The rules set forth exacting requirements for the filing of applications for permit to drill (APDs). 30 C.F.R. § 250.411 through § 250.418.

The OCSLA authorizes the Secretary to promulgate regulations relating to lease suspensions, which stop the running of the primary term by a period equivalent to the period of such suspension. 43 U.S.C. § 1334(a)(1)(2000); 30 C.F.R. §§ 250.169(a), 250.180(b), 256.73(a). A lessee may obtain an SOO in the following circumstance:

> The Regional Supervisor may grant an SOO when necessary to allow [the lessee] time to begin drilling or other operations when [the lessee is] prevented by reasons beyond [its] control, such as unexpected weather, unavoidable accidents, or drilling rig delays.

30 C.F.R. § 250.175(a). Effective February 10, 2006, MMS issued Notice to Lessees No. (NTL) 2006-G02,

providing guidance regarding authority for SOOs.[2] It stated:

> [P]ursuant to 30 CFR 250.175(a), an SOO may be granted to extend the term of a lease when a drilling rig was contracted and scheduled to begin leaseholding operations prior to the lease expiration but due to reasons beyond your control, the rig was delayed. When considering an SOO request based on a rig delay, it is expected that no other rig options are available; therefore, any delay in the rig release date should be short term. It is expected that you have an approved plan (e.g., EP, DPP, etc.) and an approved APD.

NTL 2006-G02 at 1 (underline in original).

Statement of Facts

MMS issued oil and gas lease OCS-G 16662, Mississippi Canyon Area (MC), Block 943, OCS, Gulf of Mexico, Offshore Louisiana, to BHP Petroleum (Gulf of Mexico), Inc. (BHP), effective August 1, 1996. The area subject to this lease is identified as Block 943 or MC 943. The lease had a primary term of 10 years because it was in an area of unusually deep water. 43 U.S.C. § 1337(b)(2)(B) (2000). In 1999, BHP Billiton Petroleum (Deepwater) submitted for approval an EP for five wells A-E,

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[2] MMS's authority to issue NTLs is set forth in 30 C.F.R. § 250.103.

including four wells on lease OCS-G 16662. The wells were to be drilled by "drillship rig" to a depth of over 4,000 feet. The EP, denominated N-6567, was approved on November 2, 1999. Administrative Record Document page (AR) 87. BHP did not conduct activity on the lease, absent which the lease was due to expire on July 31, 2006. *Id.*

Comments in the record indicate that Hydro Gulf of Mexico, L.L.C. (Hydro Gulf), bought the lease from BHP on April 24, 2006. At some point prior to May 1, 2006, Hydro Gulf submitted a revised EP, R-4305, to MMS. AR 93. ATP claims that it was not approved as of July 2006. Supplemental Statement of Reasons (SSOR) at 8. The record does not document this EP, its filing, or its status. AR 133-136 (MMS printouts showing status of EPs). In an e-mail, however, an MMS employee discussed Hydro Gulf's revised EP, explaining that the company submitted it to change the location of a well. AR 93.

ATP bought a 75% working interest in the lease and was recorded as the lease owner and operator on May 23, 2006. AR 138. This document shows a transfer of record title to ATP from BHP, not Hydro Gulf. *Id.* At this point, ATP had barely more than 2 months to begin lease operations before the lease would expire. ATP acquired the remaining 25% working interest in the lease on July 24, 2006.[3]

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[3] The SSOR implies that ATP acquired 100% of the lease on May 23, but ATP's Request for SOO,

ATP states that it entered into discussions with Diamond Drilling Company (Diamond) to drill a lease well on April 15, 2006, prior to and in anticipation of acquiring the lease. SSOR at 4. According to a document submitted as Exhibit 7 to ATP's Notice of Appeal, entitled ATP Background & Summary Activities, Diamond owns the *Ocean Quest* rig; ATP and "Noble" shared use of the rig pursuant to a drilling contract executed in 2005. AR 75, ATP Background & Summary Activities, at 1. This document claims that when Hydro Gulf entered into negotiations for the lease in "1Q 2006" (likely the "first quarter" of 2006), "ATP asked Diamond if the Rig could drill the proposed MC 943 well." *Id.* According to ATP, Diamond assured ATP that the *Ocean Quest* was capable of drilling a well on the lease to specifications. *Id.*

ATP and Diamond entered into a Domestic Daywork Drilling Contract – Offshore (Daywork Contract) on June 1, 2006, whereby Diamond committed to furnish the *Ocean Quest* to drill offshore wells for ATP during the ensuing 180-day period. Notice of Appeal, Ex. 1, AR 6-37. The Daywork Contract identifies the Gulf of Mexico (GOM) as the operating area, and specifies that the operating base is "TBD- Operator." AR 34, Contract Appendix A. The contract specifies that the rig drills

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dated July 25, 2006, confirms that ATP acquired a 25% interest in Block 943 on July 24, 2006. *See also* ATP Background & Summary Activities at 1.

only to a maximum depth of 3,500 feet. *Id.* at Article 503 and Appendix A.

ATP asserts that in early June 2006, Diamond informed ATP that it "withdrew its consent to allow the *Ocean Quest* to drill the well, citing concerns primarily relating to riser handling capability," but also because of a negative forecast for the approaching storm season. SSOR at 5. In the ATP Background & Summary Activities, ATP stated that "[o]n 1 June 2006 . . . Diamond advised ATP that the Well had gone through a complete review by Diamond. As a result of this review, Diamond was now unwilling to allow the Rig to drill the well." *Id.* at 1. An e-mail from ATP to MMS on July 14, 2006, confirms that Diamond advised ATP that it would not "allow the rig to drill the proposed well to TD," or total depth, on "01 June, 2006." AR 105.[4]

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[4] Diamond relayed to ATP that it would not drill a well on Block 943 on June 1, the same date ATP and Diamond entered into the Daywork Contract for drilling in the Gulf for wells not to exceed 3,500 feet. BHP's 1999 EP sought approval to drill four wells on Lease OCS-G 16662 in excess of 4,200 feet. ATP's implication that the Daywork Contract served as consent to drill a deep well on Block 943 is refuted by the facts that the contract did not mention the lease or Block 943, and Diamond refused such consent on the date it signed the contract. Moreover, in an e-mail communication to MMS on July 14, 2006, ATP contended that its plan

According to the SSOR, in mid-June, ATP asked Diamond if it would let the *Ocean Quest* drill a well in MC 943 "to conductor pipe depth, running casing and temporarily abandoning the well" instead of drilling a well to total depth. SSOR at 5. According to ATP, Diamond agreed to drill a well to be temporarily abandoned using the *Ocean Quest* rig. *Id.* ATP claims that it contacted MMS on June 30, 2006, to determine whether drilling such a well would provide a basis for an SOO. SSOR at 5. No such communications or commitments are documented.

The record reflects communications between ATP and MMS on July 14 and 18, 2006, during which an ATP representative discussed the situation:

> This morning (14 July), the drilling contractor has advised ATP that the engineering has been completed with the same results as those previously mentioned; i.e., the rig is [sic] capable of drilling the subject well to total depth on the proposed location in MC 943. *We have been informed that the results of this analysis have been provided to the contractor's senior management and that an answer will be provided on Monday, 17 July.* In the meantime, the contractor has also advised

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had been to use "a rig ATP had contracted in November, 2005." AR 105.

> ATP that the rig would be allowed to drill the proposed well to conductor casing depth (-1100' BML) at any time during the year.
>
> . . . ATP is requesting that the act of drilling to conductor casing depth and setting pipe be deemed a lease-holding activity. . . .
>
> *This request is being made prior to receiving the drilling contractor's answer for using the rig to drill to TD after hurricane season* so that ATP can begin the preparatory work required.

AR 105-06, e-mail from Ross Frazer, ATP, to Don Howard, MMS, Friday, July 14, 2006 (italics added). Our emphasis highlights the fact that ATP advised MMS that it had not yet received Diamond's commitment to drill to total depth. This e-mail was sent at 12:42 p.m. Howard replied at 2:02 p.m.: MMS "consider[s] drilling out of drive pipe (spudding) with a rig that is capable of drilling to TD to be a lease holding activity. What you describe is not the scenario we would normally expect . . . ." *Id.*

The communications that followed form a basis for ATP's arguments and so we detail them. Responding at 2:38 p.m. to Howard's statement that spudding a well "with a rig that is capable of drilling to TD" would be lease holding, ATP's Frazer claimed: "*The rig is capable of drilling to TD* and that was our plan up until early June when the contractor began reconsidering their earlier proposal for MC 943. If

they come back to us with a go ahead to drill to TD in nonhurricane season we will do just that." AR 104 (emphasis added). At 3:07 p.m., Howard responded: "*Your planned activity is a lease holding activity since the rig is capable* and you are drilling and setting the conductor." *Id.* (emphasis added). ATP's position at 12:42 p.m. had been that ATP was unsure of Diamond's willingness to drill to total depth, would not get an answer for several days, and was nonetheless proceeding in the absence of an answer to that question. When Howard stated that ATP's ability to spud the well at conductor casing depth depended on availability of a rig capable of drilling to total depth, ATP responded that it was. Howard's response presumed that this was true.

On July 18, 2006, Frazer and Howard resumed communications. ATP's Frazer stated that Diamond "has come back to us *confirming their original analysis and their recent election not to allow the rig to drill* our proposed well." AR 104, July 18, 2006, e-mail from Frazer to Howard (emphasis added). Frazer presumed that the option of drilling and temporarily abandoning the well remained and asked what ATP's "next step" should be. Howard replied: "*If you have an approved APD then you just need to notify the district of move on.* If not, get your APD approved and move on. After on location and about to set and cement conductor get approval to TA. [sic] TA and move off. Finishing the TA process will start your 180 day clock." AR 103, July 18, 2006, e-mail from Howard to Frazer (emphasis added). (This 180 days would be the time allowed by 30

C.F.R. § 250.180(d) when a lessee ceases operations on a lease that has continued beyond the end of its primary term as a result of lease operations.)

ATP asserts that, by letter dated July 18, 2006, Diamond alerted ATP that the lease area's potential for loop currents and tropical storm conditions would prevent it from drilling a well to TD, between 4,300 and 4,500 feet of water. SSOR at 7-8. According to ATP it received this letter on July 24, 2006. *Id.* This letter, AR 123, is the first evidence in the record that Diamond addressed in writing the use of the *Ocean Quest* for deep well drilling. The letter contains several important points. First, it represents that the *Ocean Quest* is a "semisubmersible" rig. AR 123, July 18, 2006, Letter from Diamond to ATP, date-stamped July 24, 2006. Second, the letter explains that the rig could drill in this water depth "only in extremely mild environmental conditions. Given the exposure to potential loop currents and tropical storm conditions, . . . we have concluded that it is not prudent" to drill to 4,300 to 4,500 feet. *Id.* Third, the letter advised ATP that "provided there are no hazards to mooring at the location, we are prepared to move and moor the unit on your site and initiate the well by drilling surface hole, running connector pipe at approximately 1100 feet and cementing it in place. We look forward to hearing from you in this regard." *Id.* Thus, Diamond refused to drill to total depth with the *Ocean Quest*, and was prepared to drill to conductor casing depth (1100') subject to resolving

mooring issues. At the time of the letter, ATP and Diamond had no planned date for drilling.

According to the Notice of Appeal, ATP discovered loop currents in the lease area on July 19, 2006, that would "prevent commencement of operations." Notice of Appeal at 2 and Ex. 4 (current maps), AR 63-65. In its SSOR, at 8, ATP claims that this data "indicat[ed] a problem for the proposed drilling area." In any event, by July 24, ATP was aware that loop currents would likely prevent drilling.

On July 20, 2006, the day after ATP's discovery of loop currents, it filed an amendment to the pending EP. ATP explained the need for the revision: Hydro Gulf and BHP, as noted above, had submitted EPs for "a dynamically positioned drillship"; ATP amended the plan "to provide for the use of a semi-submersible drilling unit."[5] July 20,

[5] MMS rules require a lessee/operator to revise the approved EP to change the "type of drilling rig (e.g., jack-up, platform rig, barge, submersible, semisubmersible, or drillship)," and submit the new drill plan to MMS. 30 C.F.R. §§ 250.283(a) and 250.285(a). This requirement was restated in NTL 2006-G15, issued June 12, effective July 12, 2006. AR 150. A revised EP is subject to the same rules with respect to the timing of MMS approval, 30 C.F.R. §§ 250.231 (15 business days) and 250.233 (30 days) as an EP. 30 C.F.R. § 250.285(c).

2006, EP Amendment at 1. ATP also changed the location for Well A. *Id.* Notwithstanding the loop currents discovered the previous day, ATP requested expedited review of its revised EP because, it represented, operations were set to begin on July 26, 2006. EP at 1. Though MMS rules required "discussion of any [SOOs]" anticipated, 30 C.F.R. § 250.213(f), the EP failed to notify MMS of the existence of loop currents which would prevent or pose a problem for drilling.

On July 25, 2006, ATP filed an APD using MMS's online eWell program. According to ATP, the APD proposed "to set four anchors, jet drive pie in [sic], drill conductor hole and set the casing at approximately 1100 feet BML followed by temporarily abandoning the well" beginning July 29, 2006. SSOR at 8, citing AR 47- 60. Perhaps because the APD forms are for drilling wells to total depth, and do not envision applications for temporarily abandoning a well after setting casing a quarter of the distance to depth, it is difficult to read the APD as applying for the option described by ATP. The APD addressed, designed, and depicted the proposed well as one to a total depth of 4,425 feet. *See* APD, Supplemental APD Information Sheet, AR 49; Well Bore Data Sheet, AR 50; Casing Design, AR 57. An MMS eWell system print-out dated August 16, 2006, lists the APD's status as "pending," and notes as "error": "APDRig: Water too deep for Rig's rated water depth." AR 62.

ATP also filed a request for an SOO on July 25, 2006. ATP explained:

> ATP has a rig, the Diamond "*Ocean Quest*", under contract that has limits to its capability of completing the drilling of the planned well however, ATP plans to utilize the rig to 'spud' the well to hold the lease. ATP has presented the proposed plan and received confirmation from Mr. Don Howard, MMS Regional Supervisor that spudding the well would constitute 'lease hold operations'. Additionally, ATP has submitted a revised exploration plan (REP) which is pending approval but expected to be approved by 26 July 2006 and an APD which has been submitted via e-well at the time of this letter request.

AR 67, Request for SOO at 2. ATP explained that it had the "rig under contract," that it had been "anticipated to arrive on location" on July 28, that loop currents prevented this, and that the rig had moved on to offshore Block 409 to complete another operation. *Id.* ATP asserted that it could not forecast "timing and location duration," and asked for a SOO lasting until September 30, 2006. *Id.* at 2; SSOR at 8-9; AR 127-133; AR 66-72.

By letter dated July 27, 2006, in response to telephone communications with MMS, ATP summarized its efforts to solve its problems with the lease.

> ATP has the . . . "*Ocean Quest*" under contract for 180 days. The "*Ocean Quest*" is a semi-submersible rated to drill in 3,500' of water. When ATP acquired this lease from Hydro we asked Diamond Offshore to perform a riser and mooring analysis to see if the rig could move to 4,400' of water. *The engineering study showed that it was possible, but the riser tension requirements had the slimmest of safety margins. Diamond Offshore subsequently decided not to allow ATP to perform operations* on the Oasis project due to engineering and commercial concerns regarding the riser.
>
> ATP then developed an alternate plan to drill the well using the "*Ocean Quest*" but only drill the well down to the conductor setting depth (+/- 1,100') which would hold the lease with operations as confirmed by Mr. Don Howard. ATP would eliminate the issues with the drilling riser by doing as much of the drilling as possible prior to being required to run the riser. *Problems then arose with the mooring system during hurricane season.*

AR 114, Letter from ATP to MMS, at 1 (emphasis added). ATP explained its attempt to solve the mooring problems "from two angles," using either partial mooring (4 mooring lines) or setting "all anchors" (8 lines). "Diamond rejected the minimal mooring approach for two reasons," which ATP described. *Id.* The complete mooring approach (8

lines) also had "several issues," which caused ATP to conclude that "[t]rying to perform this work with a small rig during the statistically worst months of hurricane season is not what we believe to be the most prudent thing to do and may result in a later drilling of the well. The mooring analysis will be completed soon and submitted to the district office in conjunction with the APD." AR 115, July 27, 2006, Letter from ATP to MMS, at 2.

Thus, on the same date it submitted the APD, ATP asked for an SOO. ATP's explanation was that it had never been able to obtain commitment from Diamond to drill the deep well or to find a mooring system that would allow it to drill to "conductor setting depth" before the lease expiration date.

MMS did not approve the SOO, EP, or APD prior to the July 31, 2006, lease expiration date. During the ensuing month, ATP attempted to obtain the services of "BP's" *Marianas* rig and MMS waited to be advised of some option by which ATP could maintain the lease by drilling. On August 17, 2006, ATP and MMS representatives met to discuss the lease, at ATP's request. SSOR at 12; AR 86 (meeting minutes). MMS granted ATP another week to contract with BP for use of the *Marianas* to drill the well to total depth, and committed to grant the SOO if ATP was able to contract the *Marianas*. SSOR at 13; SSOR Ex. A, Affidavit of Gregory Roland, ATP, at ¶ 8. ATP's efforts were unsuccessful.

On August 29, 2006, MMS issued the decision denying the SOO. MMS relied on NTLs 2000-G17 and 2006-GO2, explaining that it was ATP's responsibility to show that a drilling rig was scheduled to commence operations prior to lease expiration and to have an approved plan (in this case, the EP) and APD. MMS noted that even "[i]n the absence of loop currents . . . ATP would have been unable to commence drilling operations prior to lease exploration because of its failure to meet regulatory requirements." Decision at 1.

Appeal

ATP filed a Notice of Appeal. ATP argues that 30 C.F.R. § 250.175(a) grants MMS the authority to issue an SOO when drilling and operations are prevented for reasons beyond the applicant's control, and that NTL 2006-G02 has recognized that lack of rig availability after Hurricane Katrina would qualify as a reason beyond the applicant's control for purposes of that rule. SSOR at 16-17. ATP also claims that MMS erred in denying the SOO for a lack of an approved EP or APD, because 30 C.F.R. § 250.175 does not make such prior approval a condition for an SOO. SSOR at 15. ATP claims that the existence of the loop currents, a bad storm season forecast, and drilling rig delays were circumstances beyond its control. SSOR at 16. ATP claims that it did everything in its power to begin drilling before the lease expiration date but was unable to do so. ATP charges that MMS was biased. SSOR at 23-24. ATP points to an e-mail from an

MMS employee suggesting to another that ATP was trying to mislead the agency in order to file documents at the last minute. AR at 88, Aug. 17, 2006, e-mail from David Trocquet to Betty Lau.

Alternatively, ATP argues that the circumstances constitute a *de facto* SOO. ATP states that it informed MMS of its attempts to secure a drilling rig from the time of lease purchase until the SOO was denied, and that MMS "approved ATP's best plan for the TA well." SSOR at 24. ATP contends that MMS never alerted ATP that an SOO would be denied unless the EP or APD had first been approved. *Id.* at 24. ATP claims that MMS implied an SOO was imminent and that MMS's eWell system which recorded the APD request "corroborated what MMS representatives were telling ATP." *Id.* at 25. ATP complains of a delay between an August 9, 2006, telephone message from MMS that the SOO was denied and the final decision letter dated August 29. *Id.* ATP claims that it was never told that there would be a problem securing the SOO and therefore relied on the mistaken belief that it would have time after July 31, 2006, to secure a drilling rig because the lease would be suspended. *Id.* ATP asserts that MMS's silence regarding the prerequisites for an SOO prior to July 31, 2006, should constitute a *de facto* suspension. ATP submits a Request for Hearing, claiming, at 3, that testimony would permit review of the communications among MMS, ATP, and Diamond, and the facts surrounding the drilling rig.

MMS argues that it properly denied the SOO because ATP had not obtained approval of either an EP or an APD permitting ATP to drill a well before the end of the primary term of the lease. Answer at 1. MMS asserts that the existence of loop currents and the lack of a drilling rig had no effect on the requirement to obtain an approved EP or APD. Answer at 6. MMS explains that, whether or not 30 C.F.R. § 250.175(a) explicitly requires an applicant to have either an approved EP or APD prior to receiving an SOO, other regulations plainly require such approvals before lease activity. Answer at 5, citing 30 C.F.R. §§ 250.211, 250.410.

MMS denies bias against ATP, and avers that the cited e-mail had no effect on the agency's decision. Answer at 7 n.5. MMS documents that it has approved 65 of the 69 applications for SOO ATP has filed since 1994, to refute any suggestion of bias against the company. Answer, Ex. 2, Affidavit of Betty Lau at 1.

MMS denies that its actions could have constituted a *de facto* suspension. MMS avers it did not approve ATP's revised EP because ATP failed to address the impact of the mooring lines on certain biologic communities, as required by 30 C.F.R. §§ 250.203 and 250.227. Answer at 2. MMS contends that it never received a completed APD for the well site, because ATP never established a workable mooring plan for a drilling contractor to use. *Id.* at 3, 7. MMS explains that the eWell site defines the term "pending" to mean that an APD is "in the process of

being completed by the operator." Answer, Ex. 2 Attachment A, APD/AST/ABP Permit Selection List Page Help at 1. According to MMS, the eWell site makes clear to users that approval of an APD does not occur until after it is listed as "submitted," defined to mean that an APD has "been completed and submitted" to MMS. *Id.* MMS denies the existence of relevant disputed facts or a need for a hearing. Opposition to Request for Hearing.

Analysis

[1] ATP is correct that the relevant rule, 30 C.F.R. § 250.175(a), does not make an approved EP or APD a regulatory prerequisite for obtaining an SOO. As the rule fails to address EPs or APDs at all, it follows that it does not prohibit denial of an SOO for failure to obtain an approved EP or APD. Therefore, the issue is not whether MMS is prohibited from denying an SOO for failure of a lessee to obtain an approved EP or APD, as ATP implies. Rather, the issue is whether MMS abused its discretion by holding that ATP's failure to obtain approval for its EP and APD, in light of the facts of the case, was sufficient reason to deny the SOO. We find that MMS acted within its authority under 30 C.F.R. § 250.175(a).

As a factual matter, ATP did not obtain approval of an EP or APD, and we agree with MMS that ATP failed to act within time constraints evident from the regulations. ATP does not and cannot deny the regulatory structure outlined above.

Exploratory lease activity must be approved by MMS. 30 C.F.R. § 250.201. To obtain approval, the EP, or revised EP, must be submitted to MMS. 30 C.F.R. §§ 250.211, 250.285(c). A revised EP must be submitted to change the type of rig to be used. 30 C.F.R. § 250.283. Once an EP or revised EP is submitted, the rules anticipate that MMS will determine within 15 business days whether the EP has been submitted, and will act on it within another 30 days. 30 C.F.R. §§ 250.231, 250.233.

ATP did nothing to comply with the regulations governing EPs until July 20, when it submitted a revised EP. BHP's approved EP was for a drillship rig; the *Ocean Quest* is a semi-submersible rig. Thus, if ATP ever intended to use the *Ocean Quest*, it was on notice that it was required to submit a revised EP. It waited until July 20, almost 2 months after acquiring a lease with an expiration date in 11 days. The contract ATP had with Diamond since 2005, and its discussions with Diamond about use of the rig for Block 943, prevent ATP from claiming ignorance that the *Ocean Quest* was a semi-submersible rig. Nor can it claim ignorance of the timing established for MMS regulatory approval. The rules required an approved revised EP before lease activities could occur, and anticipated 30 days, at a minimum, for MMS to approve an EP. We need not speculate why ATP did

not quickly submit a revised EP for use of the *Ocean Quest*; it is enough that it did not do so.[6]

Moreover, ATP has no basis for confusion over the need to submit and obtain approval of an APD to drill a well. 30 C.F.R. § 250.410. ATP waited until July 25 to submit an APD contemporaneous with its SOO request. By that date, ATP was not anticipating drilling a well before the lease expired. The SOO request explicitly stated that loop currents prevented the *Ocean Quest* from moving onto Block 943 and that the rig had moved on to Block 409 to complete operations there. Thus, ATP filed its APD on July 25 in order to obtain an SOO, not to actually drill a well before lease expiration. In these circumstances, we do not find MMS abused its discretion by denying the SOO for failure of the lessee to have an approved EP and APD.

ATP argues that MMS could have approved the EP and the APD, and therefore that the timing of approval means that it is, effectively, MMS's fault that the regulatory conditions for obtaining an SOO were not met. Therefore, ATP asks us to find that MMS's inaction constituted a *de facto* suspension. We disagree.

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[6] We question ATP's failure to inform MMS of a need for an SOO when it filed its revised EP. 30 C.F.R. § 250.213(f). ATP knew by July 19 of the loop currents.

MMS approves EPs and APDs for lease activities. Nothing in the regulatory scheme expects MMS to approve such documents for purposes of extending a lease that would otherwise expire for nondevelopment. To the extent ATP filed these documents at the last minute, expecting MMS to approve plans for a well ATP plainly could not drill before the lease term ended, it was effectively asking MMS to approve the EP and APD so it could obtain an SOO, not for lease activity that in any event it could not perform.

MMS rules make clear that MMS has several weeks to consider and approve the EP. ATP knows this. 30 C.F.R. §§ 250.231, 250.233. ATP reveals its understanding that it was necessary to conduct approved lease activity before the lease expiration date by describing negotiations with Diamond before the purchase of the lease was even effective. SSOR at 4. It was ATP's responsibility to file both the EP and APD early enough before the expiration of the lease to obtain MMS's approval within the time allowed by the regulations. Nothing in the record suggests that MMS took an inordinate amount of time with the filings or allowed ATP to believe that filings with respect to a well ATP did not anticipate could be drilled before the expiration date would nonetheless be approved before then. Neither the EP nor the APD was considered complete and ready for processing at the time of filing. At the time they were filed, ATP knew Diamond would not permit the *Ocean Quest* to drill any well on the lease due to loop currents. SSOR at 7-8.

Thus, we do not find that MMS's action or inaction constitutes a *de facto* suspension. Though we find no case addressing such an argument under the OCSLA, the Board has issued decisions involving lease suspensions pursuant to the Mineral Leasing Act (MLA), 30 U.S.C. § 209 *et seq.* (2000), and confronted similar arguments that the Bureau of Land Management (BLM) was required to grant last-minute suspension requests. We held that lessees are responsible for timely filing plans and permit applications and cannot expect a lease to be suspended to facilitate the belated filing of such documents. In *Nevdak Oil and Gas Exploration, Inc.*, 104 IBLA 133, 137 (1988), we upheld BLM's refusal to grant a lease suspension where an APD was filed 22 days before expiration of a 5-year lease. Though the APD was approved 1 day before the lease expired, drilling was not possible at that point. We stated that this fact was not attributable to any act, omission, or delay by BLM, but rather the process was "begun too late." *Id.* In *Harvey E. Yates Co.*, 156 IBLA 100, 106 (2001), we rejected the suggestion that BLM's approval of an APD 7 days before a lease expiration date, also too late for the work in question to be performed, constituted a *de facto* suspension. We find such precedent equally applicable here; the lessee's responsibility for timely action under an MLA lease is no different from that under an OCSLA lease. We will not hold that MMS's failure to approve an EP filed 11 days before, and an APD filed 6 days before, lease expiration constitutes a *de facto* SOO.

Moreover, we find no basis in 30 C.F.R. § 250.175(a) for concluding that MMS is deprived of the discretion to reject a request for an SOO where the lessee has no approved EP and APD to which a suspension might pertain. The regulatory history of 30 C.F.R. § 250.175(a) makes clear that an SOO was never intended to exempt a lessee from regulatory requirements. 30 C.F.R. §§ 250.211, 250.410.

Prior to 1979, the U.S. Geological Survey (USGS) (MMS's predecessor) could suspend operations that threatened immediate, serious, or significant damage to life, property, leased or other mineral deposits, or the environment. 30 C.F.R. § 250.12(c)(1) (1978). USGS could suspend operations in the interest of conservation, for failure of the lessee to comply with law, lease terms, or regulations, or to facilitate the preparation of an environmental impact statement. 30 C.F.R. § 250.12(d) (1978). Thereafter, OCSLA amendments prompted a restructuring of OCSLA regulations in 1979. During notice and comment on a proposed rulemaking, commenters proposed that USGS should grant lease suspensions after an EP or DPP had been filed but was still being processed. The Department rejected such comments on the following grounds:

> It is the Department's view that it is the lessee's responsibility to assure that comprehensive exploration plans are submitted and carried out early enough in the initial term of a lease to allow for the

> discovery and delineation of hydrocarbon accumulations, and to prepare and submit a schedule for the expeditious initiation of production.

44 Fed. Reg. 61888 (Oct. 26, 1979).

A 1988 rule revision permitted lease suspensions when reasons beyond the lessee's control prevented operations from continuing. 30 C.F.R. § 250.10(a)(4) (1988). Such reasons included unexpected weather or unavoidable accidents. *Id.* The SOO regulations were later renumbered and restructured in 1999 to separate rules related to SOOs and SOPs. 30 C.F.R. §§ 250.174 (SOPs), 250.175 (SOOs).[7]

Thus, the Department considered a provision granting an SOO to allow additional time for filing and processing an EP in 1979, and rejected it, explaining that it was the lessee's responsibility to file an EP in a timely manner to allow for MMS's approval and for commencement of operations before lease expiration. No change has occurred in this

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[7] The regulation, 30 C.F.R. § 250.175, was amended in 2002 and 2005 to permit SOOs when the existence of a salt sheet interferes with identification of a potential hydrocarbon-bearing formation or when a lessee may drill a well below 25,000 feet. 30 C.F.R. § 250.175(b), (c). These changes are of no relevance here.

respect.[8] We find no basis for concluding that MMS abused its discretion by denying an SOO, where, on the facts of record, no EP was filed sufficiently in advance to support a reasonable expectation that, under agency rules, it necessarily would be approved before the lease expired.

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[8] In *Kerr-McGee Oil & Gas Corp.*, 172 IBLA 195, 201 (2007), we cited 30 C.F.R. § 250.175(a) for the statement that MMS rules "allow lessees to undertake little or no operations on an OCS lease for up to 180 days for any reason or no reason at all. By the end of that period, however, the lessee must either be engaged in operations on its lease or have at least applied for a SOO/SOP [suspension of production]." In that case, the lessee engaged in lease production for years before ceasing operations. When a lessee stops production operations on a lease that has continued beyond its primary term, 30 C.F.R. § 250.180(d) provides that the "lease will expire unless [the lessee] resume[s] operations or receive[s] an SOO or an SOP from the Regional Supervisor under §§ 250.172, 250.173, 250.174, or 250.175 before the end of the 180th day after [it] stop[s] operations." By this decision we clarify that the quoted language from *Kerr-McGee* meant to construe 30 C.F.R. § 250.180(d), and was not intended to construe 30 C.F.R. § 250.175(a) or to hold that a lessee that has never engaged in any lease activities is entitled to an additional 180 days after the primary lease term before it must seek an SOO or SOP.

MMS reviewed the situation and correctly found that even if weather conditions were ideal and a rig was available to drill the well to total depth, a well could not have been drilled because ATP lacked required approvals to do so. ATP complains that this conclusion was wrong because, if those conditions pertained, MMS would have approved the EP and APD. ATP therefore reasons that MMS's decision was actually based upon weather conditions outside ATP's control.

But the question of whether weather, loop currents, or delay in securing a rig prohibits drilling only arises when the lessee has "a drilling rig [that] was contracted and scheduled to begin leaseholding operations prior to the lease expiration." NTL 2006-G02. We need not speculate whether MMS might have approved the EP and APD, even ones filed so close to a lease expiration date, if ATP had contracted for an appropriate drilling rig and scheduled it to begin leaseholding operations prior to the lease expiration. As shown above this never happened.

The record shows that ATP acquired a lease close to its expiration date, a risky venture. It gambled that the semi-submersible rig it had had under contract since 2005, approved to drill to 3,500 feet, could be pressed to drill a deeper well. ATP attempted repeatedly to obtain a commitment from Diamond for this, but did not succeed. At the time Diamond signed the Daywork Contract, it advised ATP of its refusal to agree to such a plan. Pressed

again in mid-July, Diamond refused again. Diamond's first documented agreement even to drill and spud the well at 1,100 feet arrived in ATP's door on July 24, at a time when ATP knew that loop currents would prevent Diamond from moving the rig to Block 943, and that Diamond would only use the rig for the temporary operation when the mooring issue was settled. As late as July 27, ATP advised MMS it had not been able to work out mooring arrangements with Diamond. It follows that ATP never had a contract to drill any well on Block 943. Thus, ATP never had "a drilling rig [that] was contracted and scheduled to begin leaseholding operations prior to the lease expiration." NTL 2006-G02.

Further, we find no evidence of bias. The e-mail comment that ATP finds so offensive merely expresses an opinion on the facts that we have identified from the record; it is those facts that defeat ATP's appeal, not the MMS employee's comments. Moreover, rather than bias, we see MMS as having attempted to keep the lease alive even after it expired by its own terms. But even 30 days after lease expiration, ATP could find no option to conduct lease activities, and so MMS allowed the EP and APD, without the amendment that would have been required, to go unapproved.

Finally, we find no basis upon which to conclude that Don Howard's e-mail communications constituted the approval or basis for *de facto* suspension that ATP attempts to read into it. A set

of e-mail communications cannot supplant the approved lease activity that MMS' detailed regulations require. An approved EP and APD were required before any lease activity or operation could be initiated. Notwithstanding ATP's representations to Howard, it never was able to submit a plan for a scheduled operation on the lease, and therefore, whatever the meaning of Howard's final comment, it is irrelevant. Even if it were relevant, however, it seems clear to us that Howard conditioned his communications on the understanding that the rig in question would ultimately be able to drill to total depth, a matter which was never true.[9]

We find no basis upon which to conduct a factual hearing. The record is clear; ATP's intentions in conducting communications with Diamond or MMS cannot obscure the fact that it never was able to contract a schedule to begin leaseholding operations on Block 943 prior to lease expiration.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the

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[9] We make one final point on these exchanges. Electronic mail allows quick and timely communications. Lest MMS and BLM ultimately conclude that they communicate with the public to their detriment, we will not infer commitments that bind MMS, based upon the abbreviated and imprecise exchange of information that is represented here.

Secretary of the Interior, 43 C.F.R. § 4.1, the request for hearing is denied and the decision appealed from is affirmed.

/s/
Lisa Hemmer
Administrative Judge

I concur:

/s/
T. Britt Price
Administrative Judge

Case 2:08-cv-01514-MVL-SS Document 54
Filed 08/26/2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ATP OIL & GAS CORPORATION, INC.	CIVIL ACTION NO: 08-1514 SECTION: "S" (1)

VERSUS

DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE; KEN SALAZAR (PREVIOUSLY DIRK KEMPTHORNE), SECRETARY OF THE DEPARTMENT OF INTERIOR; WALTER D. CRUICKSHANK (PREVIOUSLY RANDALL B. LUTHI), ACTING DIRECTOR OF THE MINERALS MANAGEMENT SERVICE; AND LARS HERBST (PREVIOUSLY CHRIS C. OYNES), REGIONAL DIRECTOR OF THE GULF OF MEXICO OCS REGION MINERALS MANAGEMENT SERVICE

ORDER AND REASONS

IT IS HEREBY ORDERED that ATP Oil & Gas Corporation, Inc.'s motion for summary judgment is **DENIED**. (Document #37.)

IT IS FURTHER ORDERED that the cross-motion for summary judgment of the Department of the Interior; Minerals Management Service; Ken Salazar, Secretary of the Department of the Interior; Walter D. Cruickshank, Acting Director of the Minerals Management Service; and Lars Herbst,

Regional Director of the Gulf of Mexico OCS Region, Minerals Management Service, is **GRANTED**. (Document #44.)

I. BACKGROUND

On January 4, 2008, the Interior Board of Land Appeals of the Office of Hearings and Appeals of the United States Department of Interior (the Board), issued a decision affirming the August 29, 2006, decision of the Minerals Management Service (MMS), denying ATP's request for a Suspension of Operations (S00) of Lease OCS-G 16662 (the lease), Mississippi Canyon Area, Block 943, OCS Federal Waters, Gulf of Mexico, Offshore Louisiana. ATP filed a complaint against the Department of the Interior; Minerals Management Service; Ken Salazar, Secretary of the Department of the Interior; Walter D. Cruickshank, Acting Director of the Minerals Management Service; and Lars Herbst, Regional Director of the Gulf of Mexico OCS Region, Minerals Management Service[1], seeking judicial review of the Board's decision.

ATP alleges the following underlying facts. On February 10, 2006, as a result of a shortage of drilling rigs in the offshore oil and gas industry, exacerbated in the Gulf of Mexico Outer Continental

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[1] The defendants are substituted as parties, pursuant to Federal Rule of Civil Procedure 25(d)(1). The previous defendants were the Department of the Interior; MMS; Dirk Kempthorne, Secretary of the Department of Interior; Randall B. Luthi, Director of the MMS; and Chris C. Oynes, Regional Director of the Gulf of Mexico OCS Region Minerals Management Service.

Shelf by Hurricanes Katrina and Rita, MMS sought to ameliorate the harsh effects of lease termination by implementing "Notice to Lessees (NTL),"[2] a temporary policy granting suspensions based on "a total lack of rigs capable of drilling prior to lease expiration." See Exh. 1, Administrative Record, BNTL No. 2006-G02, Suspensions of Operations Based on Rig Delays, Lack of Rig Availability and Procurement of Long Lead Equipment," effective February 10, 2006 to February 28, 2007.[3]

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[2] Notice to Lessees are formal documents that provide clarification, description, or interpretation of a regulation or OCS standard, provide guidelines on the implementation of a special lease stipulation or regional requirement, provide a better understanding of the scope and meaning of a regulation by explaining MMS interpretation of a requirement or transmit administrative information such as changes of address or telephone numbers.

[3] NTL 2006-G02 expands the suspension provided in NTL 2000-G17:

> The existing regulations, particularly, 30 CFR 250.175, allow us to grant an SOO when diligent efforts to commence drilling operations are delayed by unforeseen circumstances such as adverse weather, unavoidable accidents, or short delays in prearranged rig release date. We may grant an SOO when necessary to allow you time to begin drilling or other lease holding operations when circumstances beyond your control prevent you from conducting such operations. A fundamental component in determining whether or not you are "prevented beyond your control" is whether or not the particular drilling rig was scheduled to conduct operations at your location before the lease expiration date.

NTL No. 2006-G02 was issued for the following stated purpose:

> to provide guidance to our existing authority for approving requests for lease or unit Suspensions of Operations (SOO's) based on rig delays and to implement a temporary policy for granting SOO's based on a lack of rig availability and for unanticipated time frames needed to secure long lead equipment such as high pressure/ temperature tubulars and wellheads.
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> ....
>
> Currently, pursuant to 30 CFR 250.175(a), an SOO may be granted to extend the term of a lease when a drilling rig was contracted and scheduled to begin leaseholding operations prior to the lease expiration but due to reasons beyond your control, the rig was delayed. . . . It is expected that you have an approved plan (*e.g.* EP, DPP, etc.) and an approved APD.[4] Likewise, MMS may approve SOO's when you can demonstrate that long lead equipment was contracted and scheduled to arrive in time to commence a lease holding operation prior [to] the lease expiration date but was delayed for reasons beyond your control.

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[4] An EP is an Exploration Plan, and an APD is an Application for Permit to Drill.

. . . .

In addition to the delays described above, an SOO request may be approved under a temporary policy established by this NTL when you can demonstrate to MMS's satisfaction that a timely search has resulted in a total lack of rigs capable of drilling prior to lease expiration. In such a case, an SOO will be considered to allow time for the first available rig to commence operations, provided a drilling contract has been executed prior to lease expiration. The SOO request must include:

(1) full details, with supporting documentation, demonstrating that a timely rig search was performed,

(2) verification that a rig contract has been executed prior to lease expiration, and

(3) the anticipated date for the rig to arrive on location and commence operations.

Likewise, under this temporary policy, MMS may approve SOO's when you can demonstrate that timely attempts to secure long lead equipment needed for the commencement of leaseholding operations prior to lease expiration were unsuccessful. MMS encourages you to contact our office upon learning that your "timely attempts" were not sufficient. In such cases, before an SOO can be granted, a contract must have

> been executed for the timely delivery of the long lead equipment and the request must include the expected delivery date and an explanation why such equipment will not be delivered prior to lease expiration. Late attempts to secure a drilling rig contract or long lead equipment will not be justification for an SOO approval.

Admin. Rec., doc. #1.

ATP serves a particular niche in the offshore oil and gas industry by bringing leases into production on a short turn-around when the original lessee foregoes drilling and development late in the lease's life. The Mississippi Canyon Block 943 is a lease that was not developed by its original operator. It presents special engineering and logistical difficulties because of its deepwater location. In the Spring of 2006, ATP acquired the lease and pursued retaining of a drilling rig to begin operations before the end of the primary term. ATP communicated often, sometimes daily, with the MMS personnel on the status of its preparations. On June 1, 2006, ATP entered into a domestic daywork drilling contract in which Diamond Drilling Company agreed to furnish the OCEAN QUEST to drill the well. During the last weeks of preparations to begin operations, ATP encountered obstacles which prevented it from drilling prior to July 31, 2006, the expiration date of the primary term. Those obstacles included unexpected technical limitations, which made the rig available only for drilling the shallow first section of the well, but not drilling to total depth; the addition

of considerable time to develop a mooring program by which the rig would be moored or anchored in place, which must be approved by the OCS MMS; modification of the listing of the rig in the MMS electronic system; and loop currents in the area where the OCEAN QUEST was working and in the area of the lease, which precluded the transportation and relocation of the OCEAN QUEST. ATP informed MMS that it was pursuing an alternate strategy of contracting another rig.

ATP submitted a request to MMS on July 25, 2006, for a SOO to maintain the lease past its scheduled expiration date. In the request for a SOO, ATP stated:

> ATP has a rig, the Diamond "Ocean Quest," under contract that has limits to its capability of completing the drilling of the planned well; however, ATP plans to utilize the rig to "spud" the well to hold the lease. ATP has presented the proposed plan and received confirmation from Mr. Don Howard, MMS Regional Supervisor, that spudding the well would constitute "lease hold operations." Additionally, ATP has submitted a revised exploration plan (REP)[5] which is

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[5] A revised EP must be submitted to change the type of rig to be used. 30 C.F.R. § 250.283. Once a revised EP is submitted, MMS determines within 15 business days whether the EP has been submitted and acts on it within another 30 days. 30 C.F.R. §§ 250.231, 250.233. ATP was on notice that it had to submit a revised EP because the earlier approved EP

> pending approval but expected to be approved by 26 July 2006 and an APD which has been submitted via e-Well at the time of this letter request.

Admin. Rec., doc. #2 (citing doc. #30 under seal).

MMS did not approve the SOO, EP or APD prior to the July 31, 2006, lease expiration date.[6] During the month of August, ATP attempted to obtain the services of another rig, the *Marianas*, and MMS waited to be advised of some option by which ATP could maintain the lease by drilling. On August 17, 2006, ATP and MMS representatives met, and MMS granted ATP another week to contract for use of the *Marianas* to drill the well to total depth and committed to grant the SOO if the efforts were successful. ATP was unable to obtain the contract for the *Marianas*.

After the meeting of August 17, 2006, one of the MMS representatives who attended the meeting sent the following e-mail to the representatives in attendance and eleven other MMS personnel:

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was for a drillship rig, but the OCEAN QUEST is a semi-submersible rig, requiring a revised EP. ATP did not comply with the regulations governing EPs until July 20, 2006, when it submitted a revised EP.

[6] MMS cannot approve an EP until the state approves it under its Coastal Zone Management Act or until twenty-one days have elapsed from the time the governor of the state receives the EP. 30 C.F.R. § 250.232(b). A lessee must obtain approval of an EP before it may submit an APD. 30 C.F.R. § 250.231(a).

> After the meeting we just had with ATP, I cannot agree with the tentative decision to grant an SOO. . . . I am not clear as to their explanation for not pursuing approval. . . . I thought they indicated that they were trying to determine whether to use a 4-point or 8-point mooring system and that caused the delay in the POE/APD submittal.
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> In my opinion, if that was the case, they are either *incompetent or purposely trying to mislead us*. . . . I think it was a *case of ATP just being ATP* and submitting the requests at the last minute and figuring that should be good enough to get an SOO. (emphasis added)

By letter of August 29, 2006, the MMS Regional Supervisor denied ATP's request for a SOO. MMS relied on NTL 2000-G17 and NTL 2006-G02, stating that ATP had not shown that a drilling rig was scheduled to begin operations prior to the lease expiration date and that there was not an approved EP and APD.

On October 13, 2006, ATP filed a notice of appeal of the MMS denial of a request for a SOO, citing the new policy established by NTL 2006-G02 and its requirements. ATP argued that 1) MMS has the authority to issue a SOO when there are reasons that prevent drilling and operations that are beyond the applicant's control; 2) NTL 2006-G02 recognizes that lack of rig availability after Hurricane Katrina

is a reason beyond the applicant's control; 3) prior approval of an EP or APD is not a condition for a SOO; 4) loop currents, a bad storm season forecast, and drilling rig delays were beyond ATP's control; 5) MMS was biased; and 6) MMS's silence regarding the prerequisites is a *de facto* approval of the SOO. On December 15, 2006, ATP filed a request for a hearing before an ALJ, pursuant to 43 C.F.R. § 4.415.

On January 4, 2008, the Board issued its decision denying ATP's request for a hearing and affirming the MMS's August 29, 2006 denial of ATP's request for a SOO. The Board held that MMS acted within its authority under 30 C.F.R. § 250.175(a).

ATP filed a complaint for judicial review, alleging that the Board's decision is arbitrary, capricious, and an abuse of discretion, in violation of 5 U.S.C. § 706(2)(A), because it failed to consider the new standards for assessing requests for SOOs established after Hurricanes Katrina and Rita (count one); the Board failed to follow its on rules and regulations, in violation of § 706(2)(A) (count two); the Board abused its discretion in failing to examine significant factual and legal issues and to articulate a rational basis for denying a hearing (count three); and the Board arbitrarily dismissed ATP's argument based on the nonexistent requirement of an EP and an APD and failed to follow its own regulations and conduct a substantial inquiry (count four). ATP requests that the court set aside the Board's decision and render a decision granting the SOO. Alternatively, ATP requests that

the court remand the matter to the MMS for reconsideration, order the Board to refer the action to an AU for an evidentiary hearing, and retain jurisdiction to ensure compliance.

ATP filed a motion for summary judgment, and the defendants filed a cross-motion for summary judgment.

II. DISCUSSION

A. Legal standard

Summary judgment is proper when, viewing the evidence in the light most favorable to the non-movant, "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." *Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 809 (5th Cir. 1991); Fed. R. Civ. P. 56(c). If the moving party meets the initial burden of establishing that there is no genuine issue, the burden shifts to the non-moving party to produce evidence of the existence of a genuine issue for trial. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986). The nonmovant cannot satisfy the summary judgment burden with conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc).

B. Administrative Procedure Act

The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-56, "vests authority for administering federal OCS mineral leases in the Secretary of the Interior." *OXY USA, Inc. v. Babbitt*,

122 F.3d 251 (5th Cir. 1997); 43 U.S.C. § 1334. Oil and Gas leases on the OCS run for either five years, or ten years in the case of leases located in deep water areas of the Gulf of Mexico. 43 U.S.C. § 1337(b)(2). The lease continues after the initial period as long as oil and gas is produced in paying quantities, or drilling or well reworking operations, as approved by the Secretary, are being conducted. 30 C.F.R. § 250.180(a)(2). During the initial lease term, a lessee may request a suspension of operations to extend the initial term by a period equivalent to the term of suspension. 30 C.F.R. § 250.169(a). MMS may grant a suspension of the lease term under certain circumstances. 30 C.F.R. § 250.175(a).

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. "On review of an agency adjudication, however, the reviewing court must in general affirm the decision unless the agency's action was arbitrary, capricious, or otherwise not in accordance with law." *Amoco Production Co. v. Lujan*, 877 F.2d 1243, 1248 (5th Cir. 1989); 5 U.S.C. § 706(2)(A). The court "must honor the agency's interpretation of the law authorizing agency action so long as the interpretation is a reasonable one." *Id.* The court gives even greater deference to "an agency's interpretation of its own administrative regulation" than to its interpretation of a statute it is charged with administering. *McDonald v. Watt*, 653 F.2d 1035, 1041 (5Ih Cir. 1981).

C. Arbitrary, capricious, and not otherwise in accordance with the law

1. Board's failure to engage in a substantial inquiry and follow rules and regulations

ATP contends that the Board's decision not to grant a SOO was arbitrary, capricious, and otherwise not in accordance with the law because it rubber-stamped the MMS's original denial of ATP's request for a SOO without conducting meaningful and critical scrutiny of MMS's reasons and the record. ATP contends the Board did not follow its own rules, regulations, and policies. ATP argues that there is no requirement in the regulations that ATP obtain an approval of an EP and APD in order to receive a SOO and that such a requirement would contradict the new flexible policy in the Lack-of-Rig NTL. ATP argues that it satisfied the requirements for a SOO and that MMS personnel based the decision on personal opinions that did not involve the new policy. ATP contends that the Board erroneously held that MMS's action did not amount to the grant of a *de facto* SOO, despite evidence to the contrary. ATP argues that MMS's behavior led ATP to believe that its actions were in accord with all MMS requirements and that it had nothing more to do to obtain the SOO.

The Board summarized its decision as follows:

> We find no basis for concluding that MMS abused its discretion by denying an SOO, where, on the facts of record, no EP

was filed sufficiently in advance to support a reasonable expectation that, under agency rules, it necessarily would be approved before the lease expired.

MMS reviewed the situation and correctly found that even if weather conditions were ideal and a rig was available to drill the well to total depth, a well could not have been drilled because ATP lack required approvals to do so. . . .

But the question of whether weather, loop currents, or delay in securing a rig prohibits drilling only arises when the lessee has "a drilling rig [that] was contracted and scheduled to begin leaseholding operations prior to the lease expiration." NTL 2006-G02. We need not speculate whether MMS might have approved the EP and APD, even ones filed so close to a lease expiration date, if ATP had contracted for an appropriate drilling rig and scheduled it to begin leaseholding operations prior to the lease expiration. As shown above this never happened.

. . . . It follows that ATP never had a contract to drill any well on Block 943. Thus, ATP never had "a drilling rig [that] was contracted and scheduled to begin leaseholding operations prior to the lease expiration. NTL 2006-G02.

Further, we find no evidence of bias. The e-mail comment that ATP finds so offensive merely expresses an opinion on the facts that we have identified from this record; it is those facts that defeat ATP's

> appeal, not the MMS employee's comments. Moreover, rather than bias, we see MMS as having attempted to keep the lease alive even after it expired by its own terms. But even 30 days after lease expiration, ATP could find no option to conduct lease activities, and so MMS allowed the EP and APD, without the amendment that would have been required, to go unapproved.
>
> Finally, we find no basis upon which to conclude that Don Howard's e-mail communications constituted the approval or basis for *de facto* suspension that ATP approved lease activity that MMS's detailed regulations required. An approved EP and APD were required before any lease activity or operation could be initiated. . . . [I]t seems clear to us that Howard conditioned his communications on the understanding that the rig in question would ultimately be able to drill to total depth, a matter which was never true.

The court concludes that ATP has not established that the Board's decision was not a reasonable interpretation of the agency's regulations. The NTL 2006-G02 represented a temporary policy for granting a SOO. Under the previous policy, the applicant for a SOO had to present an executed contract for a rig; a schedule for beginning operations prior to the lease expiration; an approved plan such as an EP; and an approved APD. MMS could approve a SOO when operations were delayed for reasons beyond the lessee's control.

Under the temporary policy, in addition to the delays previously considered by the MMS, the MMS may grant a SOO if the lessee could demonstrate that a timely search had resulted in a lack of rigs capable of drilling prior to lease expiration, and a drilling contract had been executed prior to the lease expiration, even if not scheduled to begin until after the expiration of the lease. Further, MMS may approve a SOO under the temporary policy upon a showing that attempts to secure long lead equipment to begin operations prior to lease expiration were unsuccessful, and a contract had been executed, indicating the expected delivery date and an explanation of why the equipment will not be delivered prior to the lease expiration.

The court concludes that the temporary policy added the type of delays the MMS could consider, specifically those that resulted in an inability to begin drilling prior the lease expiration. The temporary policy did not change the requirement of an executed contract for a drilling rig, an EP and an APD. Under 30 C.F.R. § 250.175(a), a SOO may be granted "when necessary to allow you time to begin drilling or other operations when you are prevented by reasons beyond your control, such as unexpected weather, unavoidable accidents, or drilling rig delays."

ATP did not succeed in obtaining a commitment from Diamond to drill a deeper well. By the time there was an agreement to spud the well at 1100 feet, ATP knew that the loop currents would prevent Diamond from mooring the rig. Diamond would not permit the rig to be used for temporary

operations until the mooring issue was settled. On July 27, 2006, ATP advised MMS that it could not work out the arrangements with Diamond. Therefore, notwithstanding that ATP did not have an approved EP and APD, there is no genuine issue of material fact that ATP did not meet the requirement that a contract to begin drilling operations had been executed. The Board was reasonable in its conclusion that ATP has no basis for confusion over having to obtain approval of an APD to drill a well.

Moreover, ATP has not established that the Board incorrectly found that there was neither bias nor a *de facto* suspension. Even if a MMS representative had a negative opinion of ATP's application for a SOO, the MMS followed its regulations in denying the SOO because ATP did not have an executed drilling-rig contract or an approved EP and APD. Further, after the expiration date of the lease, MMS personnel continued to communicate with ATP. There is no authority for classifying this extended cooperation as a *de facto* suspension.

Accordingly, the decision of the Board was not arbitrary, capricious, or otherwise not in accordance with the law in affirming the MMS's denial of the SOO, and the defendants are entitled to judgment as a matter of law.

2. Board's failure to articulate basis for denying a hearing

ATP denies that a dispute exists as to any material fact supporting the grant of a SOO;

however, to the extent that there is a genuine issue of fact, ATP argues that it is entitled to a hearing before an ALJ. ATP contends that, by denying a hearing, the Board deprived it of an opportunity to adjudicate the claim that MMS's actions amount to the grant of a SOO and to show that the facts do not constitute substantial evidence to support the Board's decision.

The Board denied a factual hearing for the following reasons:

> We find no basis upon which to conduct a factual hearing. The record is clear; ATP's intentions in conducting communications with Diamond or MMS cannot obscure the fact that it never was able to contract a schedule to begin leaseholding operations on Block 943 prior to lease expiration.

ATP does not identify material issues of fact that were not resolved and that require a hearing before an administrative law judge. Accordingly, ATP has not established that the Board's decision in denying a hearing was arbitrary, capricious, or otherwise not in accordance with law.

III. CONCLUSION

There are no genuine issues of material fact, and the defendants are entitled to judgment as a matter or law. The defendants' motion for summary judgment is granted, and ATP's motion for summary judgment is denied.

New Orleans, Louisiana,
this 26th day of August, 2009.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

Case: 2:08-cv-01514-MVL-SS Document 55
Date Filed: 08/26/2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ATP OIL & GAS CORPORATION, INC.	CIVIL ACTION NO: 08-1514 SECTION: "S" (1)

VERSUS

DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE; KEN SALAZAR (PREVIOUSLY DIRK KEMPTHORNE), SECRETARY OF THE DEPARTMENT OF INTERIOR; WALTER D. CRUICKSHANK (PREVIOUSLY RANDALL B. LUTHI), ACTING DIRECTOR OF THE MINERALS MANAGEMENT SERVICE; AND LARS HERBST (PREVIOUSLY CHRIS C. OYNES), REGIONAL DIRECTOR OF THE GULF OF MEXICO OCS REGION MINERALS MANAGEMENT SERVICE

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgement in favor of the defendants, the Department of the Interior; Minerals Management Service; Ken Salazar, Secretary of the Department of the Interior; Walter D. Cruickshank, Acting Director of the Minerals Management Service; and Lars Herbst, Regional Director of the Gulf of Mexico OCS Region, Minerals Management Service, land against the plaintiff, ATP

Oil & Gas Corporation, Inc., **DISMISSING** the complaint.

New Orleans, Louisiana,
this 26th day of August, 2009.

/s/ Mary Ann Vial Lemmon
MARY ANN VIAL LEMMON
UNITED STATES DISTRICT JUDGE

Case: 09-30953 Document: 00511306467
Date Filed: 11/30/2010

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 09-30953

ATP OIL & GAS CORPORATION, INC.,

Plaintiff - Appellant

v.

MINERALS MANAGEMENT SERVICE; KEN SALAZAR, Secretary, Department of the Interior; MICHAEL R. BROMWICH, Director of the Minerals Management Service; LARS T. HERBST, Regional Director of the Gulf of Mexico OCS Region Minerals as of October 1, 2007; UNITED STATES DEPARTMENT OF INTERIOR,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 9/23/2010, 5 Cir., _____, _____, F.3d _____)

Before GARZA, BENAVIDES, Circuit Judges, and LYNN, District Judge.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

☐ The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

☐ A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG4A

Case: 2:08-cv-01514-MVL-SS Document: 63
Date Filed: 12/08/2010

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 09-30953

D.C. Docket No. 2:08-CV-1514 S

ATP OIL & GAS CORPORATION, INC.,

Plaintiff - Appellant

v.

MINERALS MANAGEMENT SERVICE; KEN SALAZAR, Secretary, Department of the Interior; MICHAEL R. BROMWICH, Director of the Minerals Management Service; LARS T. HERBST, Regional Director of the Gulf of Mexico OCS Region Minerals as of October 1, 2007; UNITED STATES DEPARTMENT OF INTERIOR,

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

Before GARZA and BENAVIDES, Circuit Judges, and LYNN[1], District Judge.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

A True Copy
Attest

Clerk, U.S. Court of
Appeals, Fifth Circuit

By: /s/ Gina R. Martin
Deputy
New Orleans, Louisiana

ISSUED AS MANDATE: 08 Dec 2010

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[1] District Judge for the Northern District of Texas, sitting by designation.

5 USC Sec. 706

TITLE 5 – GOVERNMENT ORGANIZATION

AND EMPLOYEES

PART I – THE AGENCIES GENERALLY

CHAPTER 7 – JUDICIAL REVIEW

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

-SOURCE-

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

43 USC Sec. 1334

TITLE 43 – PUBLIC LANDS

CHAPTER 29 – SUBMERGED LANDS

SUBCHAPTER III – OUTER

CONTITNENTAL SHELF LANDS

SEC. 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter an scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal

Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect to matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions –

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

5 USC Sec. 551

TITLE 5 – GOVERNMENT ORGANIZATION

AND EMPLOYEES

PART I – THE AGENCIES GENERALLY

CHAPTER 5 – ADMINISTRATIVE

PROCEDURE

SUBCHAPTER II – ADMINISTRATIVE

PROCEDURE

Sec. 551. Definitions

For the purpose of this subchapter –

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

5 USC Sec. 553

TITLE 5 – GOVERNMENT ORGANIZATION

AND EMPLOYEES

PART I – THE AGENCIES GENERALLY

CHAPTER 5 – ADMINISTRATIVE

PROCEDURE

SUBCHAPTER II - ADMINISTRATIVE

PROCEDURE

Sec. 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved –

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretive rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 USC Sec. 558

TITLE 5 – GOVERNMENT ORGANIZATION

AND EMPLOYEES

PART I – THE AGENCIES GENERALLY

CHAPTER 5 – ADMINISTRATIVE

PROCEDURE

SUBCHAPTER II - ADMINISTRATIVE

PROCEDURE

Sec. 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and

557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given -

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

[Code of Federal Regulations]

[Title 30, Volume 2]

[Revised as of July 1, 2006]

From the U.S. Government Printing Office via GPO Access

[CITE: 30CFR250.103]

TITLE 30—MINERAL RESOURCES

CHAPTER II—MINERALS MANAGEMENT SERVICE, DEPARTMENTOF THE INTERIOR

PART 250-OIL AND GAS AND SULPHUR OPERATIONS IN THE OUTER CONTINENTAL SHELF

Subpart A-General

Sec. 250.103 Where can I find more information about the requirements in this part?

MMS may issue Notices to lessees and Operators (NTLs) that clarify, supplement, or

provide more detail about certain requirements. NTLs may also outline what you must provide as required information in your various submissions to MMS.

UNITED STATES DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE
GULF OF MEXICO OCS REGION

NTL No. 2006-G02

Effective Date: February 10, 2006

Expiration Date: February 28, 2008

NOTICE TO LESSEES AND OPERATORS OF FEDERAL OIL AND GAS LEASES IN THE OUTER CONTINENTAL SHELF, GULF OF MEXICO OCS REGION

Suspensions of Operations Based on Rig Delays, Lack of Rig Availability and Procurement of Long Lead Equipment

This Notice to Lessees and Operators (NTL) is issued pursuant to 30 CFR 250.103 and 30 CFR 250.175(a) to provide guidance to our existing authority for approving requests for lease or unit Suspensions of Operations (SOO's) based on rig delays and to implement a temporary policy for granting SOO's based on a lack of rig availability and for unanticipated time frames needed to secure long lead equipment such as high pressure/temperature tubulars and wellheads.

In accordance with the Outer Continental Shelf (OCS) Lands Acts, regulations, and current policy, the Department expects lessees to explore and commence development within the primary term of any OCS lease. However, pursuant to 30 CFR

250.175(a), the Regional Supervisor may grant an SOO when necessary to allow you time to begin drilling or other operations when you are prevented by reasons beyond your control such as unexpected weather, unavoidable accidents, or drilling rig delays. In general, SOO's are short in duration.

Currently, pursuant to 30 CFR 250.175(a), an SOO may be granted to extend the term of a lease when a drilling rig was contracted and scheduled to begin leaseholding operations prior to the lease expiration but due to reasons beyond your control, the rig was delayed. When considering an SOO request based on a rig delay, it is expected that no other rig options are available; therefore, any delay in the rig release date should be short term. It is expected that you have an approved plan (e.g., EP, DPP, etc.) and an approved APD. Likewise, MMS may approve SOO's when you can demonstrate that long lead equipment was contracted and scheduled to arrive in time to commence a lease holding operation prior the lease expiration date but was delayed for reasons beyond your control. In addition, any SOO request must include:

(1) verification that a rig or a long lead equipment contract has been executed,

(2) the original date before lease expiration the rig or long lead equipment was expected to arrive on the lease,

(3) full details explaining the delay,

(4) the new anticipated date for the rig or long lead equipment to arrive on location, and

(5) the expected date operations will commence.

In addition to the delays as described above, an SOO request may be approved under a temporary policy established by this NTL when you can demonstrate to MMS's satisfaction that a timely search has resulted in a total lack of rigs capable of drilling prior to lease expiration. In such a case, an SOO will be considered to allow time for the first available rig to commence operations, provided a drilling contract has been executed prior to lease expiration. The SOO request must include:

(1) full details, with supporting documentation, demonstrating that a timely rig search was performed,

(2) verification that a rig contract has been executed prior to lease expiration, and

(3) the anticipated date for the rig to arrive on location and commence operations.

Likewise, under this temporary policy, MMS may approve SOO's when you can demonstrate that timely attempts to secure long lead equipment needed for the commencement of leaseholding operations prior to lease expiration were unsuccessful. MMS encourages you to contact our office upon learning that your "timely attempts" were not sufficient. In such cases, before an SOO can be granted, a contract must have been executed for the timely delivery of the long lead equipment and the request must include the expected delivery date and an explanation why such equipment will not be delivered prior to lease expiration. Late attempts to

secure a drilling rig contract or long lead equipment will not be justification for an SOO approval.

In all cases, SOO requests must be received by the MMS prior to lease expiration. Late permit filings (e.g., EP, APD, etc.) will not be justification for an SOO approval.

If you have any questions, please 'contact Kevin J. Karl at (504)736-2632, kevin.karl@mms.gov; or Ronald Konecni at (504)736-2661, ronald.konecni@mms.gov.

Paperwork Reduction Act of 1995 Statement

The information collection referred to in this NTL is intended to provide clarification, description, or interpretation of requirements contained in 30 CFR 250.175, suspension of operations. The Office of Management and Budget (OMB) has approved the information collection requirements in these regulations under OMB Control Number 1010-0114. This NTL does not impose additional information collection requirements subject to the Paperwork Reduction Act of 1995.

Chris C. Oynes
[Original Signed]
Regional Director

Lau, Betty

From: Trocquet, David

Sent: Thursday, August 17, 2006 6:35 PM

To: Lau, Betty

Cc: Schoennagel, Charles; Melancon, Mike; Karl, Kevin; Konecni, Ronald; Moser, Cathy; Tolbert, Michael; Weber, Glen; Dessauer, Stephen P; Trosclair, Troy; Herbst, Lars; Hrabec, Michael

Subject: ATP's SOO Request at MC 943

Betty,

After the meeting we just had with ATP, I cannot agree with the tentative decision to grant an SOO. It may have been beyond ATP's control to be able to move the Ocean Quest onto MC 943 because of loop currents, but I do not believe it was beyond their control in getting the revised POE and APD approved. I am not clear as to their explanation for not pursuing approval. Was it that since the SOO was submitted, all that was necessary was for the POE and APD to be submitted? I thought they indicated that they were trying to determine whether to use a 4-point or 8 point mooring system

and that caused the delay in the POE/APD submittal. In my opinion, if that was the case, they are either incompetent or purposely trying to mislead us. As of 7/14/06, ATP planned to drill the well (riserless) to the conductor casing setting depth of 1100' bml and they knew it would be considered lease-holding (per Don's email). The APD was not created and attempted to be submitted by them until 7/25/06. It was proposed to be drilled with the Quest riserless through the setting and cementing of the 20" casing. It would probably have been a 5-day operation. ATP had to know that MMS would not have had a problem with the Moored Rig Risk Assessment for such a quick operation. In the meeting, they kept saying that they knew the MMS would have had problems with the 8-point mooring design (the stay on location if a hurricane passed design) so were considering the 4-point design so they could cut and run if a hurricane threatened. The flaw in that explanation is that they knew that we would not have had a Risk Assessment issue with such a short operation, but were misleading us with their explanation for not submitting the POE and APO earlier and not responding to the Plans Section with the anchor patterns. I think it was a case of ATP just being ATP and submitting the requests at the last minute and figuring that should be good enough to get an SOO.

I recommend having ATP document the reason why the POE and APD were submitted so late and why no anchor pattern was submitted with either. Also, per the Well Activity Report for MC 711 Well SS005, on 7/31/06, the subsea tree was landed on

the wellhead. Therefore, there is no way that the rig could have left any earlier and moved to MC 943. Even if there were no loop currents at MC 711 or MC 943, the rig could not have physically been able to arrive at the MC 943 location by 7/31/06.

Thanks,
Dave Trocquet

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Gulf of Mexico OCS Region
1201 Elmwood Park Boulevard
New Orleans. Louisiana 70123-2394

In Reply Refer To: MS 5321 August 29, 2006

FEDERAL EXPRESS
852783973748

Mr. Gregory D. Roland
ATP Oil & Gas Corporation
4600 Post Oak Place, Suite 200
Houston, Texas 77027-9726

Dear Mr. Roland:

Your letter dated July 25, 2006, supplemented by your letter dated July 27, 2006, and e-mails dated July 31 and August 1, 2006, requests an initial suspension of operations (SOO) for Lease OCS-G 16662, Mississippi Canyon (MC) Block 943. This lease was in its primary term through July 31, 2006.

ATP Oil & Gas Corporation (ATP) has the Diamond Ocean Quest under contract and planned to use it to drill Well No. 1 on MC Block 943. According to your request, the Ocean Quest should have been able to move onto the lease to commence drilling

operations, but a loop current prevented the rig from moving off its location on MC Block 711. You requested an SOO in accordance with 30 CFR 250.175(a), which states that, "the Regional Supervisor may grant an SOO when necessary to allow you time to begin drilling or other operations when you are prevented by reasons beyond your control, such as unexpected weather, unavoidable accidents, or drilling rig delays." As stated in NTL No's. 2000-G17 and 2006-G02, you must demonstrate that a drilling rig was scheduled to commence a leaseholding operation prior to the lease expiration, but due to reasons beyond your control, the rig was delayed. Also, NTL No. 2006-G02 clearly states that it is expected that you have an approved plan (e.g., EP, DPP, etc.) and an approved Application for Permit to Drill (APD). In this case, however, two regulatory requirements which must be fulfilled prior to drilling, namely approval of an EP and approval of an APD, were not received prior to lease expiration. In fact, the APD was never officially submitted to the Minerals Management Service. In the absence of loop currents, ATP would have been unable to commence drilling operations prior to lease expiration because of its failure to meet its regulatory requirements. Therefore, your request for an SOO for Lease OCS-G 16662, pursuant to 30 CFR 250.175(a), is denied.

If ATP wishes to appeal this decision, pursuant to 30 CFR 290, a notice of appeal must be filed in the office of the Regional Supervisor, Production and Development, within 60 days of receipt of this letter.

If you have any questions regarding this matter, please contact Ms. Betty Lau at (504) 731-7819.

Sincerely,

J. Michael Melancon
Regional Supervisor
Production and
Development

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ATP OIL & GAS CORPORATION Plaintiff, DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE; DIRK KEMPTHORNE, Secretary of the Department of Interior; RANDALL B. LUTHI, Director of the Minerals Management Service; and CHRIS C. OYNES, Regional Director of the Gulf of Mexico OCS Region Minerals Management Service, Defendants.	**No. 08-1514** **Section: S** **Magistrate: 1**

ATP OIL & GAS CORPORATION'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

ATP Oil & Gas Corporation ("ATP"), pursuant to Local Civil Rule 56.1, files this Statement of

Undisputed Material Facts in support of its Motion for Summary Judgment.

1. ATP is the lessee under Lease OCS-G 16662 covering Mississippi Canyon Block 943, (referred to as the "Lease" or "MC Block 943 Lease"), having acquired 75% of the lessee's rights from Hydro Gulf of Mexico, L.L.C. by assignment dated May 17, 2006 and the remaining 25% of the lessee's rights from Energy Resource Technology, Inc. by assignment dated July 24, 2006. AR 0257-0273.

2. On February 10, 2006, the MMS implemented a new temporary policy for granting Suspensions Of Operations ("SOO") under 30 C.F.R. §250.175 (a) based on "a total lack of rigs capable of drilling prior to lease expiration." AR 0001-0002. This new policy was implemented in the form of a "Notice to Lessees" ("NTL"), namely NTL No. 2006-G02, entitled "Suspensions of Operations Based on Rig Delays, Lack of Rig Availability and Procurement of Long Lead Equipment," (hereinafter "NTL G02"). *Id.*

3. MMS implemented this new temporary policy for granting SOO's in response to the shortage of drilling rigs prevailing throughout the offshore oil and gas industry. *Id.*

4. The industry-wide rig shortage was severely exacerbated in the Gulf of Mexico Outer Continental Shelf ("OCS") by the catastrophic damage and upheaval caused by Hurricanes Katrina and Rita during the previous fall. *See, e.g.*, AR 2027.

5. NTL G02 was effective February 10, 2006 to February 28, 2008. AR 0001-0002.

6. ATP is in the business of bringing into production on a short turn around leases that have been originally issued to other lessees. AR 0038-0041, ¶s 4-6.

7. This short turn around is attributable to the fact that the decision by the original lessee to forego drilling and development normally takes place very late in the lease's life. AR 0039, ¶ 6.

8. By successfully bringing such marginal leases to production, ATP serves a particular and strategically valuable niche in the offshore oil and gas industry. AR 0039, ¶s 4, 6.

9. Since its inception in 1991, the company has had an exceptionally strong development success record of 98% in taking projects to production that were previously undeveloped and non-producing. AR 0039, ¶ 5.

10. The Lease in question, MC Block 943, was not developed by its original operator and is located in deepwater. AR 0257-0273.

11. During the Spring 2006 timeframe when ATP acquired the Lease, ATP was confronted with the additional challenges of the industry-wide rig shortage that was intensified by the catastrophic damage caused by Hurricanes Katrina and Rita. *See, e.g.*, AR 2027.

12. Both in anticipation of and upon acquiring the Lease, ATP pursued retention of a drilling rig to commence operations prior to the end of the primary

term. AR 0149-0151, ¶ 4; AR 2050-2062; AR 0199-0203; AR 0215.

13. On April 15, 2006, Scott Bellaire, ATP Vice President, Drilling, initiated discussions with Diamond Drilling Company ("Diamond") involving the capability of the semi-submersible *Ocean Quest* to drill a well in MC 943 (hereinafter "Well"). AR 0215.

14. In response to the question regarding whether the *Ocean Quest* was capable of working in approximately 4,400 feet of water, Diamond forwarded an internally generated analysis concluding that the *Ocean Quest* could drill the Well in this water depth to total depth in up to 16 foot seas and a 1.0 knot current with two riser tensioners inoperable. *Id.*, AR 0056-0076.

15. On May 11, 2006, Mr. Bellaire met with representatives of Diamond to identify the actions necessary to prepare the *Ocean Quest* to drill the Well. AR 0215.

16. On May 23, 2006, MMS approved ATP as designated operator of Lease OCS-G 16662. AR 0263.

17. ATP kept in regular communication on the status of its preparations with MMS personnel in the office of the MMS Regional Supervisor for the Gulf of Mexico, based in New Orleans (hereinafter "OCS Region MMS" unless specifically designated otherwise). *See, e.g.*, AR 0199-0203; AR 0215.

18. Prior to the lease expiration date, ATP entered into a Domestic Daywork Drilling Contract dated June 1, 2006, whereby Diamond Drilling Company committed to furnish the *Ocean Quest* to drill the well on the Lease. AR 0165-0196.

19. The Drilling Contract limited the *Ocean Quest* to drill in 3,500 feet of water in unlimited conditions. *Id.*

20. Diamond Drilling, equivocated on and, with less than two weeks left, withdrew its approval on July 18th for the use of the rig to drill the well to total depth under any circumstances, citing primary concerns relating to the riser handling capability and also concerns about the forecast of an active storm season for 2006 and about fulfilling future commitments with the *Ocean Quest*. AR 2059; AR 0199.

21. ATP asked Diamond to consider drilling the Well to conductor pipe depth, running casing and temporarily abandoning the well (hereinafter the "TA Well"). AR 0199.

22. Diamond responded that it would be willing to let the Ocean Quest drill the TA Well. *Id.*

23. On June 30, 2006, Leland E. Tate, ATP Chief Operating Officer, contacted Ron Konecni, Chief of Development and Unitization, in the MMS Production and Development group ("MMS P&D"), to confirm that ATP's commitment to perform the activity of the TA Well would provide the basis for suspension of operations if circumstances did not allow the *Ocean Quest* to move to MC 943 before the

lease expiration date. AR 0215; AR 0199. *See also* AR 0149-0150 ¶ 7.

24. On July 7, 2006, ATP requested that Diamond consider drilling the Well to total depth with the *Ocean Quest* after the 2006 season as an alternative to the TA Well. AR 0200.

25. On July 14, 2006, Ross Frazer, ATP Vice President, Engineering, contacted Don Howard by telephone to inquire whether the TA Well for MC 943 would be deemed to constitute a leaseholding activity by the MMS, to which Mr. Howard responded orally that the proposal of the TA Well would constitute a leaseholding activity. AR 0218-0221; AR 0215.

26. On July 14, 2006 at 12:42 pm, Ross Frazer, ATP Vice President, Engineering, e-mailed Mr. Don Howard, MMS's Regional Supervisor for Field Operations, with a summary of the events to date and "a request for the MMS, GOM Region to classify the activity described below [drilling the TA Well] as lease holding." AR 0220.

27. On July 14, 2006 at 14:02, Mr. Howard confirmed his earlier oral respond, replying by e-mail that:

> We consider drilling out of drive pipe (spudding) with a rig that is capable of drilling to TD to be a lease holding activity. What you describe is not the scenario we would normally expect but it is much akin to batch setting casing

and returning shortly to finish the well. *Id.*

28. On July 14, 2006 at 2:38 pm, Mr. Frazer wrote Mr. Howard by e-mail in part that:

> Our drive pipe is planned to be 36" & will be jetted to ~300 BML. We will drill out of that & to conductor setting depth at ~1100'.
>
> The rig is capable of drilling to TD and that was our plan up until early June when the contractor began reconsidering their earlier proposal for MC 943. If they come back to us with a go ahead to drill to TD in nonhurricane season we will do just that. AR 0219.

29. On July 14, 2006 at 15:07, Mr. Howard responded by e-mail to Mr. Frazer as follows:

> Your planned activity is a lease holding activity since the rig is capable and you are drilling and setting conductor. Expensive. *Id.*

30. On July 18, 2006, Mr. Frazer e-mailed Mr. Howard that:

> Our contractor has come back to us confirming their original analysis and their recent election not to allow the rig to drill our proposed MC 943 well. That leaves us in the unfortunate, and as you mentioned, expensive, position of

> performing the leaseholding activity of drilling out of drive pipe to ~1100' BML, running & cementing conductor pipe and temporarily abandoning the well at the mudline.
>
> What should our next step be in implementing this option? *Id.*

31. On July 18, 2006, Mr. Howard responded by e-mail to Mr. Frazer:

> If you have an approved APD then you just need to notify the district of move on. If not, get your APD approved and move on. After on location and about to set and cement conductor get approval to TA. TA and move off. Finishing the TA process will start your 180 day clock. AR 0218.

32. By letter dated July 18, 2006 and received by ATP on July 24, 2006, Diamond notified ATP that Diamond was withdrawing its agreement to drill ATP's proposed well, stating:

> Given the exposure to potential loop currents and tropical storm conditions in the area, we have considered the risks associated with the project and have concluded that it is not prudent. AR 2059.

33. In response to previous inquiries by ATP, in the same July 18, 2006 letter, Diamond stated that Diamond conducted detailed analyses to determine

whether *Ocean Quest* could drill wells in water depths between 4,300 and 4,500 feet of water, and had determined that *Ocean Quest* could drill in this water depth with the mud weights anticipated by ATP, "but only in extremely mild environmental conditions." *Id.*

34. Further in the same July 18, 2006 letter, Diamond offered that:

> provided there are no hazards to mooring at the location, we are prepared to move and moor the unit on your site and initiate the well by drilling surface hole, running conductor pipe at approximately 1100 feet and cementing it in place. *Id.*

35. On or about July 19, 2006, ATP obtained loop current data indicating a problem for the proposed drilling area. AR 2024-2026.

36. By letter dated July 20, 2006, from Gregory Roland, ATP Manager, Regulatory Compliance, to Nick Wetzel, MMS Plans Unit, ATP submitted an amendment to a pending Revised Exploration Plan, which had been dated April 28, 2006 and filed under the original operator's name, providing for use of a semi-submersible drilling unit rather than a dynamically positioned drillship and revising the location for the Well. AR 2001-2007.

37. In the same July 20, 2006 letter, ATP noted that the lease expired on July 31, 2006 and requested an "expedited review as operations are to commence July 26, 2006." AR 2001.

38. On July 25, 2006, ATP submitted its APD via the MMS's "e-Well" system to the MMS to set four anchors, jet drive pipe, drill conductor hole and set the casing at approximately 1100 feet BML followed by temporarily abandoning the well. AR 2008-2023; AR 0215.

39. The MMS e-Well system flagged that the *Ocean Quest* was not capable of working in the proposed water depth, due to Diamond's submission, without ATP's knowledge, of a new engineering analysis that the *Ocean Quest* was not capable of working in the proposed water depth. A.R. 2035.

40. By letter dated July 25, 2006, from Mr. Roland to Mr. Konecni and Betty Lau, Supervisor, MMS Development Unit, ATP filed its Request for Suspension of Operations ("SOO") for Lease OCS-G 16662 along with the appropriate cost recovery fee requesting an approval of an SOO through September 30, 2006. AR 2063-2069.

41. In ATP's July 25, 2006 letter, Mr. Roland explained that:

> The rig under contract [the *Ocean Quest*] was anticipated to arrive on location from Mississippi Canyon Area, Block 711, on or about Friday, July 28, 2006 to commence drilling operations however, loop currents have entered the Mississippi Canyon Area and will likely not only prevent moving off of the current location in MC 711 but will likely prohibit moving to MC 943. In

> order to keep the rig active, ATP has an activity planned in an alternate location in Garden Banks Area, Block 409 which could be completed prior to moving back to the Mississippi Canyon Area to commence the operations on MC 943 #1. AR 2064.

42. ATP's SOO request enclosed the loop current data. AR 2065-2067.

43. On July 26, 2006, Greg Roland contacted MMS upon finding out about the automatic kick-out of the APD and began the process of submitting appropriate engineering data from Diamond. AR 2015.

44. On July 27, 2006, ATP supplemented its SOO request with a letter from Mr. Bellaire and Mr. Roland to Ms. Lau (hereinafter, the "SOO Supplement"). AR 2050-2062.

45. In the SOO Supplement, Mr. Bellaire and Mr. Roland summarized their recent telephone conversation with Ms. Lau setting out the alternatives that ATP was exploring in order to start drilling prior to lease expiration. AR 2050-2051.

46. Also in its SOO Supplement, ATP informed MMS about problems that had developed with Diamond over Diamond's concerns about the adequacy of the mooring system during hurricane season, which information included Diamond's rejection of ATP's plan for a partial mooring system (4-lines) with the strategy to move the rig to safe harbor during storms, and an explanation that ATP

was still developing the mooring analysis for its alternate mooring approach to install complete mooring (8-lines), which presented the challenges of a large number of assets with a 10-mile radius of the Well location. *Id.*

47. Also in its SOO Supplement, ATP informed MMS of the problem with the loop currents running around 2 knots, stating that:

> [w]ith 2 knot currents, ATP is prevented from mooring the rig without exceeding the breaking strength of the anchor line. AR 2051.

48. Also in its July 27, 2006 SOO Supplement, ATP described the verbal contacts made by Mr. Bellaire in seeking other operators with contracted rigs capable of performing operations in water depths of 4,400 feet, including:

> With BP, Randy Dittmer, we talked specifically about two rigs, the Transocean "Marianas" and the Diamond Offshore "Ocean Confidence". With Kerr-McGee, Todd Durke, we talked specifically about two rigs, the Diamond "Ocean Valiant" and the Diamond Offshore "Ocean Star". With Hydro, we talked specifically about the Seena Drilling "Tay". AR 2051.

49. Also attached to its July 27, 2006 SOO Supplement, was the following documentation on additional contacts:

(1) July 26, 2006 e-mail from Tom Anderson, a deep water rig consultant with Marubeni Corporation, to Scott Bellaire re: "Rig Availability for Kings Peak", in which Mr. Anderson stated: "The GOM deepwater rig market survey we have performed has found all rigs capable of working in the water depths at Kings Peak are under contract till 2009 thru 2013 and 6 Major DW Operators holding those contracts have no excess rig capacity to date or in the foreseeable future." AR 2058.

(2) July 26, 2006 e-mail from Jon Murphy, of Noble Energy, Inc., to Scott Bellaire re: "Noble Deepwater rig availability" in which Mr. Murphy stated: "As per our discussion for your deepwater rig requirement in 4,400' water depth, please be advised that Noble does not have an EVA available." AR 2057.

(3) July 27, 2006 e-mail from Brenda Trammell, of Diamond Offshore Drilling, Inc., to Scott Bellaire re: "Diamond Offshore Rig Availability", in which Ms. Trammell stated: "The *Ocean Star* . . . [w]e estimate that the drilling unit could be available mid October, 2007 . . .The *Ocean America* . . . [w]e estimate that the drilling unit could be available mid April, 2008 . . .The *Ocean Valiant* . . . [w]e estimate that the drilling unit could be available mid March 2008 . . .The *Ocean Victory* . . . [w]e estimate that the drilling unit could be available mid November 2008 . . .The *Ocean Baroness* . . .[w]e estimate that the drilling unit could be available late December

2011 . . .The *Ocean Confidence* . . .[w]e estimated the drilling unit could be available early January 2008 . . ." AR 2055-2056.

(4) July 27, 2006 e-mail from Randy Clevenger, of Global Santa Fe, Inc., to Scott Bellaire re: "GSF [Global Santa Fe] Deepwater Fleet Availability with newbuilds 2006-06-15.pdf" in which Mr. Clevenger stated: "As per our conversation on GSF's Deepwater rig availability, we currently don't have any deepwater equipment that would meet ATP Oil & Gas 4000'WD+ program in the GOM." AR 2053-2054 (including GSF rig schedule of future rig availability).

(5) July 27, 2006 e-mail from Chris Pinkard, of ENSCO Offshore Company, to Scott Bellaire re: "ENSCO 7500" in which Mr. Pinkard stated: "The ENSCO 7500 (7500' DP Semi) is the only deepwater rig ENSCO has operating in the US GOM. It is currently contracted to Chevron until 2/15/08 with (2) 6 month options beyond the primary term." AR 2052.

50. On July 31, 2006, Mr. Roland sent an e-mail to Ms. Lau informing MMS that the loop currents were still in effect. AR 2044-2049.

51. On August 1, 2006, Ms. Lau sent an e-mail to James Grant, David Trocquet and Troy Trosclair informing them of the status of the ATP request for an SOO, stating "[t]he lease is currently held by a pending SOO," and requesting a determination from MMS Field Operations as to whether ATP's proposal

to drill only to 1,100 feet to set conductor casing would constitute a leaseholding operation noting that:

> ATP states that Don Howard told them it would be leaseholding. I have asked them to let me know if that statement was in writing. I am still waiting for the answer. AR 0222.

52. On August 1, 2006, Mr. Roland sent an e-mail to Ms. Lau with the e-mail confirmation from Mr. Howard that ATP's plan to drill to conductor casing depth was leaseholding, forwarding to Ms. Lau the series of six e-mail transmissions between Don Howard and ATP. AR 0218-0221.

53. Subsequently, data from the MMS e-Well system recorded that the status of the submission was categorized as "Pending." AR 2035, 2036.

54. A handwritten notation on the first sheet of the August 7 e-Well data packet stated: "No Letter or e-mail from Diamond" and "After receiving location, Diamond reran engineering analysis unbeknownst to ATP." AR 2035.

55. On August 11, 2006, Jerry Schlief, ATP Senior Vice President, sent an e-mail to Mike Melancon and Chris Oynes requesting "a meeting to discuss the status and certain other matters concerning Mississippi Canyon 943" and further stating:

> I think that ATP has done everything that is possible to secure an extension (through an SOO) of MC 943. We

> would like to have the opportunity to go over these matters as soon as possible. Please let us know what dates would work for the MMS and we will have the ATP representatives come to the appropriate MMS' office. Leland Tate informed me today that we might be able to get the *Marianas* very soon from BP and we could use that rig to drill the well at MC 943; however, we will need to act very quickly. AR 0213-0214.

56. On August 14, 2006, Mr. Melancon responded to Mr. Schlief, stating that: "We need to meet as soon as possible since the lease is beyond the primary term." AR 0213.

57. On August 17, 2006, representatives of ATP met with representatives of MMS. AR 0209-0210.

58. The roster from the meeting of August 17, 2006 identifies ATP representatives Ross Frazer, Scott Bellair, Gregory Roland and Leland Tate, and MMS representatives Betty Lau, Cathy Moser, Michael Tolbert, Ron Konecni, Kevin Karl, J. Michael Melancon, Mike Hrabec, David Trocquet and Glen Weber. AR 0209.

59. The MMS data sheet summarizing the August 17, 2006 meeting stated:

> Upon meeting with the company, MMS decided to permit the company additional time to contract a new rig to drill the well to TD. AR 0210.

60. By telephone call on the afternoon of August 17 following the meeting of representatives, the MMS expressly offered to grant a SOO to ATP on the condition that ATP successfully contract for a specific rig, the B.P. *Marianas*, within 7 days. AR 0201-0212.

61. On the evening of August 17, 2006, David Trocquet of MMS sent an e-mail to Ms. Lau, copied to eleven other MMS personnel. AR 0212.

62. The e-mail message from Mr. Trocquet on the evening of August 17, 2006 stated in part:

> After the meeting we just had with ATP, I cannot agree with the tentative decision to grant an SOO. It may have been beyond ATP's control to be able to move the Ocean Quest onto MC 943 because of loop currents, but I do not believe it was beyond their control in getting the revised POE and APD approved. I am not clear as to their explanation for not pursuing approval. Was it that since the SOO was submitted, all that was necessary was for the POE and APD to be submitted? I thought they indicated that they were trying to determine whether to use a 4-point or 8-point mooring system and that caused the delay in the POE/APD submittal. In my opinion, if that was the case, they are either incompetent or purposely trying to mislead us. . . . The flaw in that explanation is that they

> knew that we would not have had a Risk Assessment issue with such a short operation, but were misleading us with their explanation for not submitting the POE and APD earlier and not responding to the Plans Section with the anchor patterns. I think it was a case of ATP just being ATP and submitting the requests at the last minute and figuring that should be good enough to get an SOO. *Id.*

63. By letter dated August 29, 2006, the MMS's Mr. Melancon formally notified ATP that its request for an SOO was denied AR 0204-0206, stating as the grounds for the denial:

> In this case, however, two regulatory requirements which must be fulfilled prior to drilling, namely approval of an EP and approval of an APD, were not received prior to lease expiration. In fact, the APD was never officially submitted to the Minerals Management Service. AR 0204.

64. On October 4, 2006, ATP submitted a revised 8-point mooring plan to the MMS. AR 2034.

65. On October 13, 2006, ATP filed a timely Notice of Appeal of the MMS denial of ATP's request for an SOO. AR 0162-0203.

66. On December 1, 2006, ATP filed its Supplemental Statement of Reasons in support of its Appeal. AR 0119-0151.

67. On January 24, 2007, the MMS filed its Answer to ATP's Notice of Appeal and Supplemental Statement of Reasons. As part of its Answer, MMS attached two affidavits from Betty Lau and Troy Trosclair, respectively. AR 0077-0104.

68. On January 4, 2008, the IBLA admitted in its decision, IBLA 2007-26, *see* AR 0003-0018, that "ATP is correct that the relevant rule, 30 C.F.R. § 250.175(a), does not make an approved EP or APD a regulatory prerequisite for obtaining an SOO." 173 IBLA 260; AR 0013.

69. Among other things, Ms. Lau's affidavit states that, at the request of the MMS's Solicitor's office, Ms. Lau carried out distinct searches or analyses involving the number and disposition of requests for suspensions submitted by ATP and the determination of the average time by the Gulf of Mexico Region of the MMS to process revised exploration or development-and-production plans submitted by the industry as a whole. AR 0093-0094.

70. Ms. Lau's affidavit also states that:

> I found that from January 1, 1994, until December 11, 2006, ATP submitted to MMS sixty-nine applications for lease suspensions. MMS approved sixty-five of those applications. Two applications were pending as of December 11, 2006; one application was withdrawn by ATP. The only request for suspension from ATP that was denied is the one at issue

> in the above-captioned appeal to the Board. AR 0093, ¶ 6.
>
> I found that from January 1, 2006, until October 27, 2006, MMS Gulf of Mexico Region received and processed one hundred and twenty-two revised plans from the offshore oil and gas industry. The Region's average processing time for those plans was twenty days. AR 0094, ¶ 9.

71. Among other things, Mr. Trosclair's affidavit states that, at the request of counsel from the MMS's Office of Solicitor, Mr. Trosclair ran a query on the appropriate database to determine the average time required by the MMS Gulf of Mexico Region to process "an application for permit to drill (APD)". AR 0103-0104, ¶ 4.

72. Mr. Trosclair's affidavit also states that:

> As a result of that query I found from January 1, 2006, until October 27, 2006, MMS's Gulf of Mexico Region processed six hundred sixteen APDs, requiring an average time of *twelve and eight-hundredths* days to process each APD. *Id.* ¶ 5 (Emphasis added).

73. Mr. Trosclair's affidavit also stated:

> Although the precise average time for processing APDs would most likely change to some degree whenever the time period or "universe" of APDs is

> changed, I have no reason to believe that the result reported in paragraph 5 of this affidavit is in error. *Id.* ¶ 6.

Respectfully submitted this 30th day of December 2008.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of December 2008 a true and correct copy of the foregoing **ATP OIL & GAS CORPORATION'S STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served via the CM/ECF filing system and addressed to:

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No. 10-1072

In The

SUPREME COURT OF THE UNITED STATES

ATP OIL & GAS CORPORATION

Petitioner,

vs.

DEPARTMENT OF THE INTERIOR; MINERALS MANAGEMENT SERVICE, NOW KNOWN AS BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT ("BOEM"); KEN SALAZAR, SECRETARY OF THE DEPARTMENT OF THE INTERIOR; MICHAEL R. BROMWICH, DIRECTOR OF BOEM; LARS T. HERBST, REGIONAL DIRECTOR OF THE GULF OF MEXICO OCS REGION, BOEM

Respondents

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 29.6 STATEMENT

The Plaintiff – Appellant in the proceedings before the United States Court of Appeals for the Fifth Circuit was ATP Oil & Gas Corporation ("ATP"). ATP states that it has no parent company and that, for purposes of this disclosure, ATP is considered to be its own parent company, and no publicly held entity holds ten percent or more of its stock.

Defendants – Appellees were the United States Department of the Interior, Minerals Management Service, now known as Bureau of Ocean Energy Management, Regulation and Enforcement; Ken Salazar, Secretary of the Department of the Interior; Michael R. Bromwich, Director of the Bureau of Ocean Energy Management, Regulation and Enforcement; Lars T. Herbst, Regional Director of the Gulf of Mexico OCS Region, Bureau of Ocean Energy Management, Regulation and Enforcement.

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I. PETITION FOR REHEARING

A. Summary.

Since the time that ATP filed its Petition for Writ of Certiorari and, notably, since this Court issued its denial, the Bureau of Ocean Energy Management, Regulation and Enforcement ("BOEM") has come forward with an announcement of a breathtaking expansion of the scope of its regulatory power and the universe of entities that will be subject to this regulatory power. Specifically, on May 2, 2011, BOEM announced that it was expanding its regulatory powers beyond OCS lessees (and their designated operators) to extend to all contractors providing oilfield services on federal OCS leases. Supp. App. 1a. It is an expansion, by many factors, of the number of companies and individuals covered by BOEM's regulatory authority. As a direct result, BOEM's announcement significantly expands the impact of its failure to comply with the Administrative Procedure Act ("APA") (5 U.S.C. §500 *et seq*,) in its use and misuse of NTLs in regulating the federal offshore lands. Thus, this announcement by BOEM makes more imperative the need for this Court's scrutiny of the administrative vehicle known as the "Notice to Lessees" or "NTL" and justifies a rehearing of the denial of ATP's Petition.

As fully set out in ATP's Petition, this case presents two important issues of first impression for this Court concerning the standards for final administrative agency review of a subordinate agency decision, in this case the denial of ATP's

request for a lease extension by Defendant Interior's sub-agency, BOEM. The underlying arbitrary and capricious actions of Defendant Interior, including BOEM, were fundamentally predicated on their improper use, after its implementation, of the NTL administrative vehicle to implement BOEM's substantive policy governing such lease extensions.

Even though BOEM's enacting regulation specifies that NTLs are to be used for limited informational and interpretive purposes, BOEM uses this vehicle indiscriminately and predominantly to establish substantive regulations and rules for operations throughout the Gulf of Mexico as well as other OCS lands. ATP's Petition provides this Court with its first review of this extensively used administrative vehicle and the inherent misuse it is susceptible to, as was done in the current case.

B. BOEM's announced expansion of its regulatory power justifies, more than ever, this Court's first scrutiny of BOEM's use of NTLs to regulate the Gulf.

1. BOEM's recent announcement vastly expands the potential effect of its errors that arise in the present case.

On May 2, 2011, without Congressional authorization and outside of rulemaking of any sort, BOEM made the far-reaching announcement that it will now sweep under its administrative rules an entirely new segment of the oil industry, that is, the oil field service companies. Supp. App. 1a. These oilfield services companies run the full spectrum of

services, from the largest of offshore drilling companies to the smallest of crew-boat operators. This expansion, as openly intended by BOEM, increases by many factors the entities and activities to be put under BOEM regulation. Notably, in the same speech, BOEM also announced a vast expansion of the scope of its substantive regulations.

ATP's Petition presented this Court with its first opportunity to look into BOEM's improper, unrestrained reliance on NTLs for substantive regulations and to correct its arbitrary and capricious misuse of the NTL in the present case, with the attendant potential misuse in the future. BOEM's recent and intervening announcement makes the need for this scrutiny more imperative because an entirely new segment of the offshore industry will be exposed to the shortcomings and resulting harms caused by BOEM's unrestrained reliance on the NTL when administering the OCSLA lands in the Gulf of Mexico.

This appeal presents a case study of an agency, the Department of the Interior, that refused to engage in meaningful compliance with its obligations under the APA to fairly and independently scrutinize what, by any measure, was a simple, but plain error by frontline administrative personnel. Instead, Interior engaged in concerted action to rationalize the subordinate agency's error that effectively denied ATP's rights to have this error reviewed and corrected under the APA. The announced expansion of BOEM's regulatory reach will unavoidably expand the already enormous stakes put into play by BOEM's challenge to the integrity of the administrative process by its

unrestrained use of NTLs, as it did in the present case.

2. The Lack-of-Rig NTL was, like most NTLs, a substantive action that was implemented in the form of a vague and imprecise policy statement.

As fully set out in its Petition, when ATP submitted its request for a lease extension on July 25, 2006, BOEM had implemented a temporary policy that liberalized the granting of such lease extensions (called a Suspension of Operations or "SOO" under BOEM regulations) in light of a worldwide shortage of drilling rigs, which was exacerbated in the Gulf of Mexico by the extensive damage caused by Hurricanes Katrina and Rita. BOEM had issued the policy on February 10, 2006 in the form of an NTL, that is, Notice to Lessees NTL No. 2006-G02, referred to here as the "Lack-of-Rig NTL." App. 75a-78a. The Lack-of-Rig NTL consisted of two distinct portions: (1) a section setting forth the temporary policy being implemented, including its three express requirements; and (2) a preamble discussing the pre-existing policy for granting SOO extensions as a comparative backdrop for the purpose and scope of the temporary policy. *Id.* The change implemented by the Lack-of-Rig NTL was a sharp, substantive break from the pre-existing regime. App. 77a.

BOEM's enacting regulation specifies that NTLs are to be used for limited informational and interpretive purposes. 30 C.F.R. §250.103. While NTLs may be an effective tool for BOEM's

administration of this crucial industry when drafted and implemented properly for the true purpose of interpretive guidance and when applied consistently, the present case highlights the inherent shortcomings of the NTL format. This format allows, in fact is premised on, an unstructured lengthy narrative that has no safeguards to ensure enforceable clarity. Therefore, it is susceptible to and invites *post hoc* variances, inconsistencies and revisionist interpretations in actual application.

The Lack-of-Rig NTL is the proto-typical example of the shortcomings of this format. It was issued in a multi-page narrative format that buried its short and only truly operative section (that is, the section containing the three requirements for an SOO under the new Lack-of-Rig policy) on a portion of the second page. App. 77a. This operative section was preceded by a lengthy preamble reiterating the pre-existing policy. App. 75a-77a. Thus, the major portion of the Lack-of-Rig NTL was verbiage not related to the requirements for a lease extension under the new policy and, therefore, was not only unnecessary, but open to ambiguity and confusion.

In addition to allowing unnecessary and confusing language, NTLs are issued unilaterally by BOEM, without input from and dialogue with anyone outside the agency, therefore excluding experts, interested parties and stakeholders whether within or outside the industry. As a direct result, NTLs inherently lack the distilling and corrective benefits of notice and comment rulemaking that provides input from sources outside the agency itself. This Court has previously recognized the required benefit and fairness of the notice and comment

process "to assure fairness and mature consideration of rules of general application." *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). Defendant Interior itself has long recognized the importance of public participation in rulemaking. Yet, without public input and comment, NTLs have no process for review and input by outside sources that could ensure the requisite clarity and accountability that could prevent subsequent arbitrary and capricious re-interpretation and inconsistent application of NTL-implemented policies.

This Court has never examined BOEM's extensive use of NTLs to regulate the critical offshore oil industry and, therefore, has never examined the inherent shortcomings of NTLs that allow the agency to avoid lawful accountability for its actions. Nor has this Court scrutinized the lack of clarity among Circuits as to the standards to which an agency should be held in promulgating substantive NTLs, in applying them fairly and consistently, and in promulgating changes to them.

The administrative record in this appeal, the IBLA Decision and the orders of the courts below present a case study of how BOEM, through the vagueness and indeterminacy of the NTL, was unimpeded in its refusal to follow the policy in its own NTL and how the lack of consistent judicial standards for the use of such documents allowed the BOEM to shield itself from accountability under APA standards of review.

3. The Defendants exploited the vague nature of the NTL to avoid effective judicial review of their failure to apply their own policy.

As ATP's Petition shows, the Lack-of-Rig NTL included an extensive discussion of the pre-existing regime that was being modified by the NTL's new policy. There is no reason to revisit the undeniable fact that, putting aside its arguments asserted on appeal, BOEM's Denial was nothing but an erroneous application of the pre-existing regime to ATP's request, as if the new policy never existed. After all, the Denial itself quoted from the preamble section of the Lack-of-Rig NTL as its only justification for refusing ATP's request, which rationale was simply reiterated by the IBLA in upholding the BOEM's Denial. Thus, this fundamental error by both Defendants arose directly from the rambling and undisciplined narrative form of the NTL, a narrative that allowed them and the reviewing courts to cite the policy that was being replaced as support for their rejection of ATP's request under the new policy.

Such an inherent shortcoming of the NTL format will allow, if not invite the kind of error as occurred here, where the regulated entity relies on a good faith and reasonable reading of the narrative, which the agency is later able to simply ignore by exploiting the vagueness of the NTL to fabricate new rationalizations for its error. In the present case, the record shows that the Defendants created, *post hoc*, entirely new requirements and application procedures for the Lack-of-Rig policy which openly

violated the *Chenery* and *Whole Record Doctrines*. In each instance, the Court of Appeals for the Fifth Circuit afforded the Defendant Interior improper latitude to recast its own policy in a manner that arose from inadequacies and shortcomings of the NTL vehicle that had been used for the substantive regulation by BOEM.

II. CONCLUSION

For these reasons, Petitioner ATP respectfully requests that this Court rehear its denial of and grant ATP's Petition for Writ of Certiorari.

Respectfully submitted on this 13th day of May, 2011.

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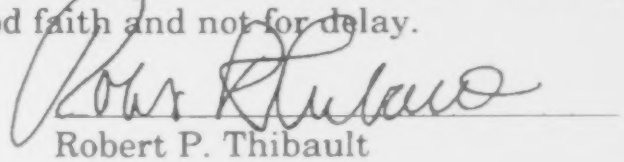
CERTIFICATE PURSUANT TO SUPREME COURT RULE 44.2.

The undersigned counsel certifies that the grounds for this Petition for Rehearing of the Denial of ATP's Petition for Writ of Certiorari are limited to intervening circumstances of a substantial effect occurring after the filing of the Petition and is being presented in good faith and not for delay.



Robert P. Thibault

THE BUREAU OF OCEAN ENERGY MANAGEMENT, REGULATION AND ENFORCEMENT

Office of Public Affairs

THE NEWS ROOM

FOR RELEASE:
May 02, 2011

BOEMRE Director Discusses the Future of Offshore Oil and Gas Development in the U.S. at Offshore Technology Conference

Houston, Texas – Bureau of Ocean Energy Management, Regulation and Enforcement (BOEMRE) Director Michael R. Bromwich delivered remarks today at the 2011 Offshore Technology Conference (OTC) in Houston, Texas.

. . .

Director Bromwich discussed the path forward for United States (U.S.) regulation of offshore oil and gas development, outlining the new offshore organizational and regulatory framework.

. . .

Good afternoon. I want to thank the conference organizers for putting together such an impressive event and for inviting me to speak about the future of offshore oil and gas development in the United States.

. . .

And today, I'd like to also announce two new major developments relating to the way we provide

information to and regulate entities that operate offshore:

. . .

Second, I have mentioned several times in recent weeks my interest in exercising regulatory authority over not only offshore operators but contractors as well. It has struck me as inappropriate to limit our authority to operators if in fact we had legal authority that reached more broadly to the activities of all entities involved in developing offshore leases. We have completed our review of the issue and have concluded that in fact we have broad legal authority over all activities relating to offshore leases, whether it engaged in by lessees, operators, or contractors. We can exercise such authority as we deem appropriate.

. . .

Contact: BOEMRE Public Affairs